No. 75-552

In the Supreme Court of the United States

OCTOBER TERM, 1975

KENT FRIZZELL, ACTING SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

SIERRA CLUB, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Solicitor General,
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The Solicitor General, on behalf of the Acting Secretary of the Interior, the Secretary of Agriculture, and the Secretary of the Army, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1A–73A) is reported at 514 F. 2d 856. The order of the court of appeals granting an injunction pending appeal (App. B, *infra*, pp. 75A–80A) is reported at 509 F. 2d 533. The order of the court of appeals remanding the case to the district court for supplemental findings (App. C, *infra*, pp. 81A–83A) is not

reported. The opinion of the district court (App. D, *infra*, pp. 85A–101A) and its supplemental findings of fact (App. E, *infra*, pp. 103A–116A) are not reported.

JURISDICTION

The judgment of the court of appeals (App. F, *infra*, pp. 117A–118A) was entered on June 16, 1975. By order of September 3, 1975, Mr. Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including October 10, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Federal law authorizes the Department of the Interior to permit coal mining on federal lands by private parties under approved mining plans. In order to evaluate the environmental effects of its leasing program and decide upon future actions, the Department prepared a nationwide, programmatic environmental impact statement. Before issuing individual leases or approving mining plans, the Department prepares an environmental impact statement considering the effects of that lease or mining plan, both individually and in combination with other leases. When necessary or appropriate, the Department also prepares impact statements for areas of intermediate size, such as the 7,800 square mile "Eastern Powder River Basin" within Wyoming.

The question presented is whether, under the National Environmental Policy Act, a court may inter-

vene in this decision making process to require federal agencies to engage, as well, in "regional" planning and to issue an additional impact statement for a four-state area so long as they continue "contemplating" private applications, even though there neither is nor will be a recommendation or report on the proposal for major federal action with respect to that four-state area.

STATUTE INVOLVED

Section 102 of the National Environmental Policy Act of 1969, 83 Stat. 853, 42 U.S.C. 4332, provides in relevant part:

> (2) all agencies of the Federal Government shall—
>
> * * * * *
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

STATEMENT

A. Federal Programs for Coal Development

As much as 80 percent of the Nation's coal reserves are under land owned by the federal government, or under land that can be mined effectively only after obtaining rights of way across federal land.[1] The Mineral Leasing Act of 1920, 41 Stat. 437, as amended, 30 U.S.C. (1970 ed. and Supp. III) 181 *et seq.*, authorizes the Department of the Interior to dispose of certain minerals by leasing to private firms and individuals, for terms of years, the rights to develop and extract coal, oil, and other minerals that lie within the federal domain and Indian lands. As privately owned coal deposits become exhausted or more expensive to mine, and as the Nation's energy needs grow, coal underlying federal lands will become more and more important as a source of energy.[2]

The development of these vast reserves of coal will inevitably affect the quality of the human environment in the vicinity of the mines. The federal government not only has the duty to superintend the development

[1] Department of the Interior, *Final Environmental Impact Statement: Proposed Federal Coal Leasing Program* 1–7 (1975) (hereafter *National Impact Statement*). A copy of the *National Impact Statement* has been lodged with the Clerk.

[2] See *National Impact Statement*, *supra*, n. 1, at 1–24 to 1–28.

of its mineral resources, but also has the duty, articulated by the National Environmental Policy Act of 1969, 83 Stat. 852, 42 U.S.C. 4331, *et seq.* (NEPA), to probe the environmental consequences of its proposed actions and to develop its resources in a manner that holds to a minimum the disruption of the environment.

In order to fulfill both of these duties, federal agencies, cooperating with each other, with state governments, and with private interests, began to take a careful look at the effects of coal development in the northern Great Plains, where most of the federal coal resources are located. On May 26, 1970, the Department of the Interior initiated the North Central Power Study, which was designed to "investigate the potential for coordinated development of the electric power supply in the north central United States" (App. D, *infra*, p. 89A). "The responses received did not indicate that a plan for the coordinated development could be formulated" (*id.* at 90A), and the Study was terminated in 1972.

The Department of the Interior also began a study of potential water resources in Montana and Wyoming, and the extent to which these resources would be adequate for, and affected by, development of coal (*ibid.*). This study was superseded on June 30, 1972, when the Department initiated the Northern Great Plains Resources Program, a much more comprehensive investigation of the social, economic and environmental aspects of coal development. That study was

designed to provide much-needed information that could guide the federal government in decision making. "The study is to provide a tool for planning at all levels of government rather than to develop an actual plan" (*id.* at 93A). The final interim report of this Program was issued on August 1, 1975.

In order to avoid making piecemeal decisions while it was gathering environmental information and formulating a national coal leasing program, the Department of the Interior announced on February 17, 1973, that it would issue no more coal prospecting permits and, with a few carefully circumscribed exceptions, it would issue no more coal leases until it had reevaluated its coal leasing policies and conducted a full environmental study (*id.* at 90A–92A). The Department simultaneously announced that it would prepare an environmental impact statement assessing the effects of its coal leasing program on a nationwide basis and undertaking to formulate a new leasing program more sensitive to environmental values. A draft of this national programmatic impact statement was issued in 1974. It was rewritten in response to comments and reissued in final form on September 19, 1975.[3] The final impact statement describes "the total proposed Departmental coal leasing program"[4] and announces the creation of a multistep Energy Minerals Activity Recommendation System[5] that takes into account both the Nation's need for coal and the need to preserve the quality of its environment.

[3] *National Impact Statement*, *supra*, n. 1.
[4] *Id.* at 1–3.
[5] *Id.* at 1–7 to 1–23.

Under the Energy Minerals Activity Recommendation System new coal leases will be made available only when necessary and, even then, "[a]ll coal lease sales would be carefully analyzed to avoid unacceptable environmental impacts or unacceptable impacts on other uses resulting from development of the proposed leases."[6] The central principle balancing the need for coal against the environmental consequences of mining is that "[l]easing will not take place where environmental damages would be unacceptable."[7]

The national programmatic environmental impact statement has surveyed the general environmental consequences of coal mining. The environmental consequences of each particular mine, however, will have to be understood in order to implement the decision that some deposits of coal will not be leased when the environmental consequences would be too great. Individual environmental impact statements therefore are prepared for each lease,[8] and the statements for successive leases or mining plans assess the cumulative effects of all coal development within the area affected. In many cases the Department of the Interior will prepare a broader impact statement assessing the effects of coal development in larger parts of the country: "the region covered will be determined by basin boundaries, drainage areas, areas of common reclamation problems, administrative boundaries,

[6] *Id.* at 1–5.
[7] *Id.* at 1–13.
[8] A more complete description appears in *id.* at 1–4.

areas of economic interdependence, and other relevant factors." [9] One such impact statement already has been prepared, and was issued in final form in 1974; this statement, consisting of 6 volumes and 3075 pages, covers the Eastern Powder River Coal Basin of Wyoming, an area of approximately 7,800 square miles that contains more than one quarter of the Nation's strippable coal reserves and three quarters of the coal reserves of the northern Great Plains.[10]

B. The Complaint and the District Court's Decision

Respondents Sierra Club and others brought suit, seeking declaratory and injunctive relief against any approval of leases, rights of way or mining plans in what their complaint called the "Northern Great Plains Region" until the federal government had prepared a comprehensive impact statement with respect to that "Region" (App. D, *infra,* p. 85A).[11] The district court, after recounting the status of the environmental investigations under way and the moratorium

[9] *Id.* at 1–4.

[10] Department of the Interior, *Final Environmental Impact Statement: Proposed Development of Coal Resources in the Eastern Powder River Coal Basin of Wyoming* (1974). See I *id.* at I–21 to I–22 (estimating that the basin contains 12.4 billion tons of economically recoverable coal out of a national total of 45 billion tons of coal economically recoverable by strip mining).

[11] The "Northern Great Plains Region" defined by the complaint includes northeastern Wyoming, eastern Montana, western North Dakota, and western South Dakota (App. D, *infra,* p. 88A). This "Region" encompasses some 90,000 square miles (App. A, *infra,* p. 5A, n. 4).

on coal leases, concluded that as of the date of its opinion (February 1974) the federal government was engaged in decision making on a national basis, and that there was no separate program taking place, or planned to take place, in the area defined by respondents as the "Northern Great Plains Region" (App. D, *infra,* pp. 95A, 96A, 100A). Therefore, the court concluded, no impact statement for the "Region" need be prepared.

The district court later entered supplemental findings in response to a remand by the court of appeals (App. C, *infra,* pp. 81A–83A). These findings (App. E, *infra,* pp. 103A–116A) brought the record up to date as of November 25, 1974.

C. The Court of Appeals' Decision

Shortly after the district court entered its supplemental findings, the court of appeals issued an injunction pending appeal (App. B, *infra,* pp. 75A–76A). This injunction prohibited the Secretary of the Interior from taking any action "concerning the mining plans and railroad rights-of-way set forth in the Eastern Powder River Coal Basin Environmental Impact Statement" (*id.* at 76A). The court of appeals did not conclude that the Eastern Powder River Basin impact statement is inadequate; indeed, its adequacy has not been challenged. It recited only that "such an injunction is required to maintain the status quo pending disposition of this appeal" (*id.* at 75A). Judge MacKinnon dissented (*id.* at 76A–80A).

Six months later a divided panel of the court of appeals reversed the district court (App. A, *infra,* pp. 1A–73A). The court held that, although petitioners have not yet violated NEPA, they will do so if they continue "contemplating" federal action in the "Northern Great Plains Region" without preparing an environmental impact statement with respect to that part of the country.[12] See App. A, *infra,* pp 2A, 47A–48A.

The court of appeals did not disturb the district court's finding that there was no existing federal program or proposal calling for regional development. It therefore had to consider respondents' argument that the various private requests for leases and rights of way were so related that the government should be required to develop a regional plan accompanied by a comprehensive impact statement (*id.* at 28A–32A). The court of appeals indicated that respondents' arguments probably were correct (*id.* at 31A–32A), but concluded that it need not explicitly so hold. It decided instead that, by engaging in regional studies and analyses such as the Northern Great Plains Resources

[12] The court of appeals' decision is interlocutory in the sense that it does not finally dispose of this litigation. However, it laid down principles of law that preordain the final outcome, and that will prolong this case (and the federal decision making process) by many years. On the other hand, if the court of appeals' judgment is reversed, the case will come to an end immediately. We submit that the court of appeals' judgment possesses sufficient finality that review at this time is both necessary and appropriate. See *Aberdeen & Rockfish R. R.* v. *SCRAP*, No. 73–1966, decided June 24, 1975, slip op. 22–25; *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 476–487; *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685, n. 3.

Program, and by receiving (albeit not granting) applications for leases, the government had demonstrated "attempts" "to control development" of coal resources in the area, which establish that a "regional program" "is *contemplated*" by the government (*id.* at 33A, 39A; emphasis added). This "contemplation" in turn triggers the impact statement requirement of NEPA, the court held, because an impact statement "must *precede*" (*id.* at 42A) any recommendation or report on a proposal for major federal action.

The court recognized that, despite its conclusion that the government is "contemplating" regional development, the "Government has not yet finally settled on its role" (*id.* at 45A). The court therefore remanded the case to the district court and directed the federal agencies to determine whether they would prepare an impact statement or whether "contrary to expectations" they would cease following the course the court thought they had been following (*id.* at 47A–50A). If the government decides not to prepare an impact statement for the region described by respondents, the court held, respondents "may present again to the District Court their theory that the geographic, environmental, and/or programmatic interrelationship of activity in the Region mandates such a statement" (*id.* at 50A). Since the court already has indicated (*id.* at 29A–32A) that respondents' contention is correct, it follows that the district court would be compelled to direct the government to prepare an impact statement if it declines the court of appeals' invitation to do so voluntarily.

The court of appeals continued in effect its temporary injunction pending appeal, even though it once more conceded that the "Secretary of the Interior has shown concern over developing the coal reserves of the Province in a responsible manner consistent with NEPA" (*id.* at 4A–5A).

Judge MacKinnon dissented, observing that the "record * * * does not establish the existence of any comprehensive *regional* program of the type * * * which could justify requiring the preparation of a regional environmental impact statement at this time" (*id.* at 54A). Because there was neither federal action with respect to the region, nor a proposal for such action, Judge MacKinnon "conclude[d] that a regional environmental impact statement * * * is not presently required * * * [and found] no need to remand the case for further proceedings" (*id.* at 52A–53A).

REASONS FOR GRANTING THE WRIT

This is the sixth year that NEPA has been in effect. During that entire period the Department of the Interior, and other federal agencies, have been giving careful scrutiny to the environmental effects of coal mining. Several extensive environmental, economic and social studies have been carried out; a national programmatic impact statement has been prepared; individual, local, and regional impact statements have been prepared. For almost three years there has been a virtual moratorium on the issuance of new leases. Now that the federal government is preparing to put the carefully designed Energy Minerals Activity Recommendation System into operation and remove

the moratorium, it has been confronted with a decision and injunction that could delay its program for several years, while it prepares yet another environmental impact statement covering a "Region" of respondents' choosing.

The court of appeals' decision implies that groups other than respondents will be able to compel the federal government either to engage in "regional planning" or to issue impact statements with respect to regions defined by them, whether or not the government has engaged in activity that has peculiar effects upon that "region." And, of course, the court's decision will require lengthy litigation in the district court on remand and will almost certainly lead to repeated appeals, injunctions, and threats of both over an extended period of time. The decision is of substantial importance to the Nation's energy resources development program, and conflicts with the language of NEPA, a decision of this Court, and decisions of other courts of appeals.

1. Section 102(2)(C) of NEPA provides that federal agencies shall include "in every recommendation or report on proposals for legislation and other major federal actions" significantly affecting the quality of the human environment a detailed statement concerning the effects of, and alternatives to, that proposal. As the Court held in *Aberdeen & Rockfish R.R.* v. *SCRAP,* No. 73–1966, decided June 24, 1975, slip op. 26 (*SCRAP II*), this language means that "the time at which the agency must prepare the final 'statement' is the time at which it makes a recommendation or report on a *proposal* for federal action."

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NEPA requires an impact statement only when the federal agency makes, recommends, or reports upon a proposal for major federal action. In *SCRAP II* private railroads had proposed to the Interstate Commerce Commission that the Commission approve an increase in the rates the railroads would be allowed to charge; the Court held that no impact statement was required until the Commission made its report upon that private proposal. Here, to the extent there are any proposals for major federal action with respect to the region defined by respondents, they are private proposals for the federal government to issue leases or approve mining plans or rights of way; as was the case in *SCRAP II,* no impact statement is necessary until the government makes a recommendation or report on those private proposals, and the Department of the Interior already has prepared (or will prepare) impact statements with respect to every major lease or mining plan approved by it.[13]

As we understand the court of appeals' opinion, it rests upon a simple misunderstanding concerning the timing established by NEPA. The court variously states that an impact statement must accompany the proposal for federal action (App. A, *infra,* p. 48A) and that an impact statement must *precede* any recommendation or report on a proposal for federal action (*id.* at 42A; 47A, n. 35). If either version were correct, it might have been necessary for the court of appeals

[13] This case does not involve the question whether an impact statement must be prepared when the government engages in major physical action for which there has never been any public proposal, recommendation, or report.

to undertake an inquiry into whether the federal government's "contemplation" of taking action in the future had ripened into a "proposal," and to "balance" the factors showing "ripeness" and those of contrary import (see *id.* at 42A–50A). It might have been necessary, as the court of appeals thought, to remand for further consideration of this "ripeness" question. But NEPA provides that the impact statement shall accompany the recommendation or report, not "precede" it; there is no "ripeness" question to address where, as here, no one contends that there has been a recommendation or report on a relevant proposal with respect to the "Region" as a whole.[14]

2. The opinion of the court of appeals appears to conclude that federal "contemplation" of certain actions must be accompanied by an impact statement. The court went on to hold that such a statement must discuss environmental consequences throughout the "Northern Great Plains Region" defined by respondents (App. A, *infra,* pp. 47A–48A). If it is assumed *arguendo* that some sort of impact statement is required, the question of the appropriate scope of that

[14] The court of appeals relied upon *Calvert Cliffs' Coordinating Committee* v. *Atomic Energy Commission*, 449 F. 2d 1109 (C.A.D.C.), and *Conservation Society of Southern Vermont, Inc.* v. *Secretary of Transportation*, 508 F. 2d 927 (C.A. 2), vacated and remanded *sub nom. Coleman* v. *The Conservation Society of Southern Vermont, Inc.*, No. 74–1413, decided October 6, 1975, to support its understanding of the appropriate time to issue an impact statement. But *Calvert Cliff's* was expressly disapproved in *SCRAP II* (see slip op. at 26, n. 20), as was *Greene County Planning Board* v. *Federal Power Commision*, 455 F. 2d 412 (C.A. 2), certiorari denied, 409 U.S. 849, upon which *Conservation Society* was based.

statement is one that has generated a conflict among the circuits requiring resolution by this Court.

Other circuits, when approaching the question of the scope of a particular impact statement, have held that a statement is sufficient if it discusses a single project of "independent utility"[15] or if it discusses all of the activities to which resources are irretrievably committed by the project for which the statement has been prepared.[16] The court of appeals, relying upon *Conservation Society, supra,* disagreed with these cases and held that an impact statement must assess, in a comprehensive manner, all actions and environmental impacts that might be related to the action proposed.

Although the court of appeals stated that its requirement of comprehensive consideration did not conflict with the "independent utility" and "foreclosure of alternatives" rules used in other circuits (*id.* at 39A–41A, n. 29), we submit that the conflict is obvious. Single leases have "independent utility" and so, under the decisions of other courts of appeals, could properly be studied alone. Each lease "irretrievably commits" no more resources than are involved in bringing the mine to production, for the first lease can be commercially feasible whether or not other leases are granted;

[15] See, *e.g.*, *Trout Unlimited* v. *Morton*, 509 F. 2d 1276 (C.A. 9); *Sierra Club* v. *Stamm*, 507 F.2d 788 (C.A. 10); *Sierra Club* v. *Callaway*, 499 F. 2d 982 (C.A. 5); *Indian Lookout Alliance* v. *Volpe*, 484 F. 2d 11 (C.A. 8).

[16] See, *e.g.*, *Daly* v. *Volpe*, 514 F. 2d 1106 (C.A. 9); *Friends of the Earth, Inc.* v. *Coleman*, 518 F. 2d 323 (C.A. 9); *Chelsa Neighborhood Ass'ns* v. *United States Postal Service*, 516 F. 2d 378 (C.A. 2).

smaller impact statements on individual mines or on intermediate areas such as the Eastern Powder River Basin therefore would be appropriate in other circuits.

The court of appeals distinguished the cases in other circuits on the ground that those cases "involved the propriety of an injunction against an individual project pending completion of a regional [impact statement] or other study," and that "[n]one of the cases involved a direct challenge to the need for a regional" impact statement (*ibid.*). Judge MacKinnon correctly answered that this "is a classic example of a distinction without a difference" (*id.* at 65A). Respondents have requested the court to enjoin the granting of leases and other coal resource development actions pending completion of an impact statement covering the "Region" defined in their complaint, and the court of appeals has issued such an injunction. Moreover, each of the cases we have collected at notes 15 and 16, *supra,* considered and rejected a contention that an impact statement was too narrow in scope because it did not assess the effects of allegedly "related" projects covered by a single plan for development. We submit that there is no practical difference between the question posed and answered by the court of appeals in the instant case, and the question as framed by the other courts of appeals.

3. The court of appeals held that the federal government had not yet violated NEPA—although, the court surmised, it would do so momentarily unless it either ceased "contemplating" action or provided a regional impact statement. Having concluded that the defend-

ants before it were in compliance with NEPA, the court of appeals should have affirmed the district court's summary judgment in favor of petitioners. It was not at liberty to reverse, remand, issue an exhaustive (but apparently advisory) opinion governing proceedings still to come, continue in effect an injunction pending appeal, and retain jurisdiction over petitioners simply out of the expectation that, in the future, they might violate NEPA. Cf. *Herb* v. *Pitcairn,* 324 U.S. 117, 126: "[O]ur power is to correct wrong judgments, not to revise opinions." The court of appeals should have held that the district court's judgment—that petitioners have not violated NEPA—was correct, and accordingly affirmed.

4. Even if an impact statement sometimes must be issued when federal agencies are "contemplating" action, and even if such a statement must assess the environmental impacts of all "related" activities throughout the relevant "region," the decision of the court of appeals is incorrect. The choice of the relevant region is, in the first instance, for federal officials, to be upset only if their choice is arbitrary, capricious or an abuse of discretion. The court of appeals agreed with these principles (App. A, *infra,* pp. 31A, n. 25; 32A; 45A–46A, n. 33; 48A, n. 36). How, then, could the court conclude that it was an abuse of discretion to select for scrutiny the Eastern Powder River Basin, an area containing more than a third of the coal reserves economically recoverable by surface mining in the northern Great Plains? The court of appeals did not explain why it was an abuse to select for "regional" study an area other than the "Northern

Great Plains Region" defined by respondents. We do not think this omission can be explained unless the court was, in fact, compelling the government to engage in "regional" planning more broadly defined, the very course it purported to eschew (*id.* at 30A–32A). That course, in turn, would raise fundamental problems under *United States* v. *SCRAP,* 412 U.S. 669 (*SCRAP I*), which held that NEPA does not repeal by implication any other statutes. The Mineral Leasing Act of 1920 grants to the Department of the Interior substantial discretion to decide how and when coal leases will be awarded; the court of appeals apparently has held that the government now must exercise that discretion on a regional basis rather than lease-by-lease as the Act provides.[17]

5. The most important flaw in the court's reasoning may be its statement that, by granting leases and receiving mining plans pertaining to the northern Great Plains, the government's "role is one of controlling development of the region" (App. A, *infra,* pp. 47A–48A). That statement, of course, begs the

[17] Although the court of appeals indicated that unless the government ceased "contemplating" issuing leases the government would be required to issue a regional impact statement for the "Northern Great Plains Region" defined by respondents, it did not explain why it selected that "region" as opposed to some alternative "region." Since there are almost an endless number of "regions" available for study, the court's opinion creates two possibilities: either the "region" studied will be whatever region is selected by the first groups to file suit, or, even after the government prepares the impact statement sought by respondents, still other groups can file suits seeking impact statements for still other "regions" in the Great Plains. Neither result is desirable; neither is required by NEPA.

question of *what* region is being "controlled." But what is more, it necessarily involves the untenable assumption that the federal government must have *some* region in mind, and that the task for the court is to direct the government to file an impact statement with respect to whatever region that may be. The court of appeals ignored the possibility that the federal coal leasing program is national rather than regional.

The government is not attempting to control the development of particular "regions"; it is attempting to control the development of coal on federal lands, which are themselves scattered throughout the country. Coal development creates "regional development" only because some federal land holdings are close to other holdings, and the effects of developing some tracts may be felt on proximate tracts. That degree of interdependence, however, and the desire of the federal government to learn more about it through tools such as the Northern Great Plains Resources Program, hardly indicates that a plan for "regional development of the Northern Great Plains" (*id.* at 33A), or of any other region, is either "contemplated" or under way. It simply demonstrates that the federal government is deeply interested in the local effects of its national policies.[18] NEPA does not require, however, that an impact statement accompany such shows of interest, however abiding the interest may be. We submit that the program of impact statements for individual mines, local groups of mines, and the nation as a whole, adequately fulfills the commands of Section 102(2)(C). It is not necessary to suspend the development of coal resources for several years more while the government prepares a "regional" impact statement as the price of continued "contemplation."

[18] One of the ironic effects of the decision below is that federal agencies would be less likely to engage in sophisticated studies such as the Northern Great Plains Resources Program, lest a court erroneously conclude from the study that the government is "contemplating" major federal action with respect to the "region" studied and, therefore, is obliged to issue a "regional" impact statement.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1975.

APPENDIX A

United States Court of Appeals for the District of Columbia Circuit

SIERRA CLUB ET AL., APPELLANTS

v.

ROGERS C. B. MORTON, SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.

(No. 74–1389)

United States Court of Appeals, District of Columbia Circuit

(Argued Dec. 17, 1974; Decided June 16, 1975)

Before BAZELON, Chief Judge, and WRIGHT and MACKINNON, Circuit Judges.

Opinion for the court filed by Circuit Judge J. SKELLY WRIGHT.

Dissenting opinion filed by Circuit Judge MACKINNON.

J. SKELLY WRIGHT, Circuit Judge:

Appellants brought suit in District Court seeking declaratory judgment, injunction, and mandamus against the federal appellees, the Departments of the Interior, the Army, and Agriculture, alleging that appellees had violated Section 102(2) of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332

(2), by allowing development of coal resources in the Northern Great Plains without issuing a comprehensive environmental impact statement (EIS) for the region. We must decide whether appellees' attempts to control development of coal resources in four western states constitute a major federal action within the meaning of Section 102(2), and, if so, whether those attempts are sufficiently developed to require the filing of a comprehensive regional impact statement. Answering the first question in the affirmative, we reverse the District Court's grant of summary judgment for the federal appellees and remand this case to give the federal appellees the opportunity to decide the second.

The Northern Great Plains Province (the Province), which covers northeastern Wyoming, eastern Montana, western North Dakota, and western South Dakota, and extends southerly through strips of Nebraska and Colorado, is one of the world's richest basins of relatively untapped coal reserves.[1] Most of the coal in the Province is located in the Fort Union and Powder River formations, which occupy the four northernmost states. The coal resting under those plains is highly desirable because it is of low sulphur content, which makes it environmentally preferable, and because it is relatively close to the surface, which makes it readily accessible by strip mining. Since some 85 per cent of the nation's low-sulphur coal reserves is located on public land under the jurisdiction of the Secretary of the Interior, prudent development of this valuable national asset is largely subject to federal initiative and control. In recent years, as concern

[1] Sixty-three counties in Wyoming, Montana, and North Dakota hold 48% of the nation's total coal reserve. Northern Great Plains Resources Draft Interim Report (hereinafter NGPRP Draft Interim Report) at III–1.

about greater national self-sufficiency in energy matters has mounted, steps toward such development in the Province have been taken. But while the coal reserves of the Province are in great demand, both over the long and the short term,[2] the massive development of the area necessary to secure, utilize, and deliver those resources necessarily entails broad environmental consequences. In addition to the obvious environmental effects of strip-mining acres of now-fertile land, development would also affect the region's water supply and quality, air quality, wildlife, population distribution and composition, and economic structure. These effects would be caused not only by the mines themselves, but by the power plants, coal gasification plants, railroads, aqueducts, pumping plants, reservoirs, dams, and new housing that would necessarily accompany the strip mines.

Needless to say, such development under federal auspices demands compliance with NEPA's dictate than an impact statement accompany all proposals for "major Federal actions significantly affecting the quality of the human environment * * *." Section 102(2)(C), 42 U.S.C. § 4332(2)(C).[3] *See generally*

[2] For at least the short term, increased use of coal is said to be the best way to ward off an energy crisis. Affidavit of Ralph E. Lapp, Ph. D., App. 286. Over the long term, at present energy growth rates the nation's need for coal will triple by the year 2000. Brief of federal appellees at 6.

[3] In pertinent part, § 102(2) of NEPA, 42 U.S.C. § 4332(2) (1970) provides:

"[A]ll agencies of the Federal Government shall—(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

* * * * *

"(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly af-

Scientists' Institute for Public Information, Inc. v. AEC (SIPI), 156 U.S. App. D.C. 395, 481 F. 2d 1079 (1973); Natural Resources Defense Council v. Morton, 148 U.S. App. D.C. 5, 458 F. 2d 827 (1972); Greene County Planning Board v. FPC, 2 Cir., 455 F. 2d 412 (1971), cert. denied, 409 U.S. 849, 93 S. Ct. 56, 34 L. Ed. 2d 90 (1972); Calvert Cliffs' Coordinating Committee, Inc. v. AEC, 146 U.S. App. D.C. 33, 449 F. 2d 1109 (1971) The Secretary of the Interior has shown concern over developing the coal reserves of

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fecting the quality of the human environment, a detailed statement by the responsible official on—(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

"Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to the environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes:

"(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources[.]

the Province in a responsible manner consistent with NEPA.[4] NEPA, he recognized, might demand comprehensive development of the Province and a more comprehensive analysis of environmental impact therein than would be produced by impact statements designed for individual mines. Thus on May 26, 1970 the Secretary initiated the North Central Power Study, an attempt to coordinate energy development throughout the North Central States. While unfavorable private response to the Study resulted in its termination, Finding of Fact (Fdg.) 13, Appendix (App.) 237, the Secretary continued to acknowledge that development should be based upon comprehensive, rather than piecemeal, action. Affidavit of Secretary Morton, App. 194. Accordingly, on June 30, 1972 he ordered a massive federal-state inter-agency study, now known as the Northern Great Plains Resources Program (NGPRP), to assess the potential social, economic, and environmental impacts that development of the Province would cause. Secretary Morton wrote to his Assistant Secretaries:

> The vast reserves of coal in the Fort Union Region of Montana, North Dakota, South Dakota and Wyoming provide an excellent opportunity for this Department to demonstrate how a responsible Federal agency can manage resource development with proper regard for environ-

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[4] There are currently 14 mining leases in operation in the Province (four in Montana, six in North Dakota, four in Wyoming) covering a total of 90,000 square miles. Fdgs. 8, 11, App. 235,236. All are operating under federally-approved mining plans and under state-approved reclamation plans. *Id.* While it is not clear from the District Court findings, it appears that all of these leases were issued, and the mining plans approved, prior to the effective date of NEPA.

The Government has also issued coal prospecting permits covering federal lands and four Indian reservations. Fdg. 10, App. 236.

> mental protection. It is important that we not lose this opportunity by engaging in single-purpose studies which are incapable of developing comprehensive information or by taking piecemeal actions which restrict our future options.

App. 73. The NGPRP was designed to "coordinate ongoing activities and build a policy framework which might help guide resource management decisions in the future." News Release, Oct. 3, 1972, App. 201. Pending its completion, the Secretary suspended a project, the Montana-Wyoming Aqueducts Study, designed to assess the availability of water for development of the vast coal resources. Fdg. 17, App. 194.

In addition to concern about development of the Province, the Secretary was also concerned about national development of a coal-leasing policy.[5] In early 1973 he determined that a national impact statement on proposed federal coal leasing was necessary, and that pending issuance of this coal programmatic statement, no coal leases would be issued except pursuant to a short-term coal-leasing policy announced to the public on February 17, 1973.[6] News Release, Feb. 17,

[5] Since the enactment of the Mineral Leasing Act of 1920, 30 U.S.C. § 181 et seq. (1970), federal coal lands have been available for leasing only, rather than for sale.

[6] The suspension policy does not apply to federal approval of coal leasing plans on Indian lands. In fulfillment of its fiduciary responsibilities over those lands, the Department of the Interior will approve leases where the tribal or individual Indian landowner desires to dispose of the minerals, where the terms and conditions of the lease are in the best interest of the Indian landowner, where appropriate environmental safeguards are imposed on the lessee, and where NEPA's requirements have been met. Affidavit of Secretary Morton, App. 193; *see* App. 199; Fdg. 22, App. 240. Since the national coal leasing suspension order of Feb. 17, 1973, however, the Department has not approved any coal leases on Indian lands within the Province. Supp. Fdg. 3.

1973, App. 196; Affidavit of Secretary Morton, App. 191; Fdgs. 15–18, App. 237–239. The purpose of the coal programmatic statement, now in draft form, is "to provide a national overview of the impact of the entire Federal coal leasing program on the quality of the human environment." Affidavit of Secretary Morton, App. 191; Fdg. 15, App. 237–238. It will supplement, as necessary, "appropriate impact reporting on a regional basis or for individual leases." News Release, Feb. 17, 1973, App. 197. Besides suspending issuance of leases, the Secretary also determined to suspend issuance of any coal prospecting permits until further notice. Secretarial Order 2952, February 13, 1973, App. 198.

While these suspension policies are nationwide, they apply only to federal approval of mine leases and prospecting permits. As was suggested above, however, development of the Northern Great Plains to accommodate the coal mines is not so limited in scope. In recognition of the broader, yet inescapably environmentally related, activities accompanying coal development, the Secretary has sharply restricted federal approval of any related action in the Province pending issuance of the NGPRP interim report. According to Secretary Morton,

> the granting or approval of leases, special use permits and all types of rights-of-way across public lands, the delivery and sale of water and approval of mining plans relating to coal development in the Northern Great Plains will be held in abeyance pending the availability of the interim report from the NGPRP study or submitted to the Under Secretary for review and concurrence prior to execution.

Affidavit of Secretary Morton, App. 194; *see* Fdg. 25, App. 241. The draft interim NGPRP report was is-

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sued September 27, 1974, Supp. Fdg. 5, and the final interim report is expected to issue in February 1975. Answer of Secretary Morton to Plaintiff's Revised Supp. Interrogatories, Ans. No. 24 (hereinafter Supp. Int. to Secretary Morton).

Despite Interior's announced moratorium on leases, prospecting permits, and other activities subject to its approval in the Province, some federal activity continues in the Northern Great Plains. Other federal agencies, all appellees here, are to some extent responsible. The Department of Agriculture has jurisdiction over issuance of rights-of-way over lands within the national forests, and the Army Corps of Engineers has jurisdiction over the navigable rivers. While both agencies refused to consider applications for permits or rights-ofway prior to June 30, 1974, they are now both accepting applications and willing to grant them. Agriculture has received four applications for rights-of-way over lands in the Northern Great Plains within the national forests,[7] and the Corps of Engineers has pending one application for a right-of-way over navigable rivers within the region.[8] Moreover, since June 30, 1974 the Corps has issued two permits for

[7] All four applications are for rights-of-way over the Thunder Basin National Grasslands in Wyoming: by Wycoalgas Co. (water transmission line right-of-way); Rochelle Coal Co. (conveyor belt right-of-way); Atlantic Richfield Co. (plant site and railroad spur right-of-way); and Rochelle Coal Co. (railroad spur right-of-way). No action will be taken on any of these applications until the Forest Service of the Department of Agriculture determines whether an impact statement is necessary. If so, of course, no action will be taken until the impact statement is completed. Supp. Fdg. 4.

[8] The pending application is from the Minnkota Power Corp. for a transmission line crossing the Missouri River near Price, North Dakota. *Id.*

structures in the navigable waters within the Northern Great Plains,[9] and has pending two applications for such permits.[10]

More importantly, the announced restrictions placed by Interior on development of the Province have some large loopholes through which federal activity can proceed. In summary form, they are as follows: (1) the short-term leasing program applies only to new leases and does not interfere with the Department's ability to approve mining plans for pre-existing leases in the area; (2) some leases may be issued under the short-term leasing policy itself; and (3) federal activity in the Province is not really suspended pending issuance of the NGPRP, but rather can continue upon the approval of the Under Secretary. The first and third of these loopholes are the largest. In the states of Wyoming, Montana, North Dakota, and South Dakota (the four-state area),[11] there are 95 outstanding leases with a total acreage of 196,652 acres not subject to an approved mining plan; likewise there are nine outstanding leases on Indian lands with a total of 76,650 acres. Supp. Int. to Secretary Morton,

[9] Permits were issued to the following: Square Butte Electric Co. (water intake structure for generating plant cooling, near Bismarck, North Dakota, issued Sept. 23, 1974); Ottertail Power Co. (removal of water intake structure for abandoned power plant near Washburn, North Dakota. Issued Oct. 15, 1974). *Id.*

[10] Pending applications are from: Michigan-Wisconsin Pipeline Co. (water intake structure for coal gasification plant near Beulah, North Dakota); Consolidated Development Co. (water intake structure out of Oahe Lake for multiple purposes). *Id.*

[11] Some of the interrogatories are addressed to this four-state area rather than to the precise confines of the Province. *See* Supp Int. to Secretary Morton. While another coal region, the Rocky Mountain Province, covers parts of Montana and Wyoming, there is no reason to suppose that the data thus presented is not useful for assessing, at least in a qualitative way, activity within the Northern Great Plains.

Ans. No. 14. Mining plans can be approved for these leases, and mining can begin thereon, upon the concurrence of the Under Secretary.[12] Since the short-term leasing policy began, at least four mining plans, one on Indian lands,[13] have been approved, and approval of four more mines in the Eastern Powder River coal basin is pending.[14] Environmental impact statements have been issued for most of these plans.[15]

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[12] Interior must act affirmatively at three points before a mine can begin operations. First, it must issue a prospecting permit, which usually contains a preference right to any subsequent lease. Second, it must issue a lease. Finally, it must approve a mining plan. The first activity is now suspended, the second governed by the short-term leasing policy, and the third continues unimpeded.

[13] Mining plans have been approved for leases held by the Amxas Coal Company in Campbell County, Wyoming (72 acres); Peabody Coal Company in Rosebud County, Montana (640 acres); Western Energy in Rosebud County, Montana (150 acres); and Westmoreland Resources in Harden County, Montana (245 acres). The Westmoreland lease is on Indian lands. Supp. Int. to Secretary Morton. Ans. No. 15.

[14] Approval is pending of mining plans submitted by Atlantic Richfield Company, Carter Oil Company, Kerr-McGee Coal Corp., and Wyodak Resources Development Corp. While the Secretary has indicated his readiness to act on these plans, Supp. Int. to Secretary Morton, Ans. No. 31, action has been stayed by order of this court, pending resolution of this appeal. Order filed Jan. 3, 1975.

[15] Impact statements have been issued for the plans submitted by Westmoreland Resources, Peabody Coal Company, and the four mines in the Eastern Powder River basin. *See* notes 13 & 14 *supra*. The validity of the Westmoreland statement was sustained in Redding v. Morton, Civ. No. 74-12-BLG (D. Mont., May 1, 1974), appeal pending, 9th Cir., No. 74-1984. The Eastern Powder River mines were considered together in one impact statement so that the cumulative effect of these related development plans could be analyzed. To assure full consideration of total impact, the statement also considered the proposed issuance of a railroad right-of-way to Burlington Northern Inc. and the Chicago and North Western Transportation Company for a new railroad route between Gillette and Douglas, Wyoming to service the new mines. The final environment statement was issued to the Council on Environmental Quality (CEQ) on Oct. 18, 1974.

There has been no contention that any of these individual statements comprehensively study the regional impact of coal development in the Northern Great Plains, and our examination of the statements makes it clear that they do not do so. *Cf.* Scientists' Institute for Public Information, Inc. v. AEC (SIPI), 156 U.S. App. D.C. 395, 408–409, 481 F. 2d 1079, 1092–1093 (1973); Natural Resources Defense Council, Inc. v. Morton, 148 U.S. App. D.C. 5, 12–13, 458 F. 2d 827, 834–835 (1972). *See also* notes 23 & 36 *infra*.

Approval is pending as well for eight other mining plans, one of which covers Indian lands, in the four-state area. Supp. Int. to Secretary Morton, Ans. No. 16. In addition to ongoing approval of mining plans, Interior has previously approved plans for 29 leases issued by the Bureau of Land Management (BLM), only half of which are operational.[16] These mines can begin operation without further federal action.

Moreover, despite the short-term leasing program, there are exceptions to the leasing moratorium. The program allows a lease to be issued

(a) When coal is needed now to maintain an existing mining operation; or

(b) When coal is needed as a reserve for production in the near future;

(c) When the land to be mined will in all cases be reclaimed in accordance with lease stipulations that will provide for environmental protection and land reclamation; and

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[16] *See* note 7 *supra*.

(d) When an environmental impact statement covering the proposed lease has been prepared when required under the National Environmental Policy Act. News Release, Feb. 17, 1973, App. 196–197; Fdg. 18, App. 238–239. Since institution of the program, four leases have been issued throughout the nation, although none are in the Northern Great Plains. Supp. Fdg. 1. Nonetheless, there are 42 competitive lease applications pending in the four-state region for a total of 272,126 acres, and 80 preference right leases pending in the region for a total of 201,668 acres. Supp. Int. to Secretary Morton, Ans. Nos. 7 & 8. Interior has proved willing to apply the exception to the the leasing moratorium in the Northern Great Plains. On July 9, 1974 the Department offered for sale a lease covering approximately 320 acres south of Stanton, North Dakota. The lease was not issued only because no bids were received. Supp. Int. to Secretary Morton, Ans. No. 2. Despite the number of pending applications, however, Interior says it is not now considering offering any further leases in the Province under the short-term leasing program. *Id.,* Ans. No. 3. The Secretary anticipates that the short-term leasing program will continue in effect "at least until after the issuance of the final coal programmatic EIS and the development of a planning system to determine the size, timing and location of future coal leases.[17] *Id.,* Ans. No. 4. The final coal programmatic statement is expected to issue shortly. *Id.,* Ans. No. 30.

Lastly, Interior has power over development of projects in the Northern Great Plains that are very

[17] *Cf.* Hearings before the Subcom. on Minerals, Materials, and Fuels of the Senate Committee on Interior and Insular Affairs, 93rd Cong., 2d Sess. 10, 17, 28 (1974) (statement of Ass't Sec. of Interior Horton that Department will end its short-term leasing policy in Sept. 1974).

closely tied to any future development of the Province's coal resources. These powers are not affected by the short-term coal-leasing policy, and are limited only by the Secretary's stated forbearance pending issuance of the NGPRP, a forbearance that evaporates upon the Under Secretary's approval of a stated project. Thus, in addition to the pending mining plans discussed above, there are now pending before the Department 14 applications for coal-related rights-of-way across the Northern Great Plains. *Id.,* Ans. No. 21. Two coal-related rights-of-way have been granted since June 30, 1974 in the four-state region, but both are outside the Northern Great Plains. Id., Ans. No. 20. Additionally, a total of 41 applications are now pending before the Department, the Corps of Engineers, or both, for option contracts for water in the Province, although no such contracts have been executed since July 1971.[18] Well over two million acre feet of annual water use are at stake. Supp. Fdg. 7.

In sum, there are pending applications for mine leases and mining plans, for rights-of-way over public lands, navigable waterways, and national forests, and for water rights in federally-controlled waters throughout the Northern Great Plains. Few such applications have been granted in the last two years as the Secretary has studied the preferred development of the region. Yet the time when action will be taken is close at hand. The final coal programmatic EIS and the final interim report of the NGPRP will issue shortly, if they have not issued already. The flood of applications will then be ripe for approval, and the massive development of the Northern Great Plains will begin.

[18] One such application was denied in September 1973. Supp. Fdg. 7.

II

Plaintiffs-appellants are a collection of organizations interested in protection of the environment. They brought suit on behalf of themselves and their members, *see* Sierra Club v. Morton, 405 U.S. 727. 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972), on June 13, 1973, charging that the Departments of the Interior, Agriculture, and the Army (the federal appellees) had authorized development of coal resources in the Northern Great Plains Region (the Region), defined as northeastern Wyoming, eastern Montana, and the western Dakotas, in violation of NEPA. Specifically, appellants charged that NEPA precluded development of the Region except after preparation of a comprehensive environmental impact statement, systematic interdisciplinary studies of coal development, and a study of appropriate alternative courses of action. 42 U.S.C. § 4332 (2)(A), (C), and (D). Appellants sought a declaratory judgment that NEPA was being violated, an injunction barring future federal action in the Region until the requirements of NEPA were met, and an order compelling the federal appellees to comply with NEPA. Complaint at 22–23, App. 22–23. A number of coal mining companies, utility companies, and the Crow Tribe of Indians (the intervenor appellees), all having interests in development of the Province, were allowed to intervene as defendants.

After limited discovery appellants moved, on August 31, 1973, for summary judgment. App. 66. The federal and intervenor appellees filed various cross-motions for summary judgment and judgment on the pleadings. App. 164, 168, 171. On February 14, 1974 the District Court denied appellants' motion for summary judgment and granted appellees' motions. While

finding, and reciting most of the facts outlined above, *see supra,* slip pages 731–737, —— U.S. App. D.C. pages ——, —— F. 2d pages ——, the District Court concluded that the Region, as defined in appellants' complaint, "is not an entity, region, or area which has been defined by the Federal Government by statute or executive action for purposes of any Federal program, project, or action." Fdg. 7, App. 235. Moreover, despite the facts outlined above, "[t]here is no existing or proposed Federal regional program, plan, project, or other regional 'federal action' *within the meaning of NEPA Section 102(2)* for the development of coal or other resources" in the Region. Fdg. 8, App. 235 (emphasis in original). The court then held that in the absence of regional federal action, multiple applications for individual federal action in connection with individual private projects which are unrelated to one another except geographically do not either constitute regional federal action or mandate a regional impact statement. Conclusion of Law (Concl.) 4, App. 245. Likewise, NEPA Sections 102(2)(A) and (D) do not require a regional approach unless the federal action subject to those requirements is already regionally based. Concl. 5, App. 246. Finally, the court ruled that the NGPRP "is a study project and not a program for development," and, as such, it does not "ha[ve] life" within the meaning of NEPA. Concl. 9, App. 248. Even if a regional plan existed, the court ruled, NEPA would not prohibit proceeding with individual projects and, in any case, appellants would not be entitled to an injunction since they have not shown the likelihood of irreparable harm. Concl. 10 & 11, App. 248.

Appellants filed their notice of appeal on March 19, 1974. On March 26, 1974 the District Court denied ap-

pellants' motion for an injunction pending appeal, and appellants then filed, on April 12, 1974, a motion in this court for an injunction pending appeal and an expedited hearing. The motion for an expedited hearing was granted on June 17, 1974. While the court, Leventhal and Tamm, J.J., denied the motion for the broad injunction pending appeal because it lacked adequate knowledge of certain dispositive facts, it noted "the spectre of significant harm to large tracts of valuable wilderness still remains," and it urged the federal appellees to exercise "substantial restraint" in continuing development of coal resources in the Region lest the court's jurisdiction to decide the need for a comprehensive impact statement be, for all practical purposes, defeated. Order filed June 17, 1974.

Argument was scheduled for mid-October, but on October 14, 1974 the court, Leventhal and Nichols, JJ., ordered, *sua sponte,* argument rescheduled for December 17, 1974, meanwhile remanding the record to the District Court for a further evidentiary hearing designed to answer certain factual questions so as to make the record as current as possible.[19] The parties

[19] The supplemental questions were as follows:

1. Is the limitation on the issuance by the United States of coal leases announced on February 17, 1973, still in effect? How many leases have been issued for lands in the Northern Great Plains region since February 17, 1973?

2. Is the suspension of the issuance by the United States of coal prospecting permits announced on February 13, 1973, still in effect? How many, if any coal prospecting permits have been issued in the Northern Great Plains region since February 13, 1973?

3. To what extent has coal leasing on Indian lands in the Northern Great Plains region been approved by the Department of the Interior since February 17, 1973.

4. Have any applications for permits for rights-of-way over lands within national forests in the Northern Great Plains region been considered or acted upon by the Department of Agriculture since June 30, 1974? Have any applications for permits for rights-of-way over navigable rivers in the Northern Great Plains region been considered or acted upon by the Corps of Engineers since June 30, 1974?

5. Has the Northern Great Plains Resources Program interim report been released? Is any further action contemplated regarding that program?

6. Does the United States Government contemplate the preparation of any further environmental impact statements—other than statements for individual projects—for the Northern Great Plains area, the Fort Union Formation, or for any subregion thereof?

7. What is the status of the granting of water rights and water contracts in the Northern Great Plains area?

8. How was the area to be covered by the EIS for the development of coal resources in the Eastern Powder River Coal Basin defined, and how was it determined that an EIS was appropriate for that area?

9. Regarding environmental impact statements for individual projects in the Northern Great Plains area, where the statements have been issued after February 17, 1973, or prepared for projects that were commenced after that time—a. Provide one or more representative statements. b. Do the statements attempt to provide an assessment of the cumulative impact of the governmental action in the surrounding area? c. Do the statements take into account the ecological setting created by private action in the area? d. Has the government devised any procedure for cross-referencing among the individual statements?

Order, Oct. 14, 1974.

were allowed to file supplemental memoranda concern- in the District Court's supplemental findings. The District Court has provided us with full answers to the certified questions, but has alhered to its original conclusions of law. Thus we may deem the court to have found these additional facts not inconsistent with its original conclusion. After oral argument we granted appellants' motion for a limited injunction pending this decision, and ordered the Secretary of the Interior, pending further order, to take no action concerning the mining plant and railroad rights-of-

way ready for approval in the Eastern Powder River coal basin and discussed in the Eastern Powder River EIS. Order filed January 3, 1975. Having the benefit of the District Court's original and supplemental findings, and the original briefs and supplemental memoranda of the parties, we must now turn to the merits.[20]

[20] We can dispose here of two preliminary defenses raised by appellees and given credence by the District Court, namely, whether this case presents a justiciable case or controversy, and whether appellant organizations have standing to sue. The District Court held that "the courts will not review the validity of supporting statements or studies until final Federal actions taken under NEPA Section 102(2) and until after final agency action has been taken with respect to the individual project," Concl. 7, App. 247, and that, therefore, no case or controversy had been stated. Concl. 8, App. 247. While the court is correct that as a general proposition of law NEPA challenges to individual projects can be brought only after final agency approval of a project, *see e.g.*, Committee to Stop Route 7 v. Volpe, D.Conn., 346 F.Supp. 731 (1972), the court seems to assume that (1) only individual actions can be challenged, and (2) appellants do not allege that final actions have occurred. Both of these assumptions are erroneous, and we find that appellants have stated a case of controversy.

First, as will be made clear in text below, *SIPI* firmly holds not only that a comprehensive program can be challenged under NEPA, but that the suit does not have to be brought via an attack on an individual action. Even though the AEC's Liquid Metal Fast Breeder Reactor (LMFBR) program was only in "the research and development stage and no specific implementing action which would significantly affect the environment had yet been taken," *SIPI*, *supra* note 15, 156 U.S.App.D.C. at 398, 481 F.2d at 1082, the court found the program "has life," which, for purposes of NEPA, was sufficient to make a case or controversy.

"The instant case is ripe under these principles since the issue tendered for review is whether an impact statement on the AEC's LMFBR program is *presently* required under NEPA. * * * In the context of a long-range program such as is involved here, judicial review of compliance with NEPA is necessary at stages at which significant resources are being committed, lest the statute's basic purpose be thwarted." 156 U.S.App.D.C. at 403 n. 29, 481 F.2d at 1086 n. 29 (emphasis in original). As we shall make clear below, we think appellees' plans to control development of the Northern Great Plains have sufficient life to state a case or controversy.

Second, appellants allege that appellees' conduct in the Northern Great Plains constitutes a "major federal action," so that a NEPA statement is required. Actions, both past and imminent, have been alleged. While the courts will typically not rule in NEPA cases until after the agency decision to act, the essence of appellants' complaint is that appellees have already decided to act, although they have not admitted as much. Again, *SIPI* is directly in point. *SIPI* recognized, necessarily, the propriety of judicial intervention in determining the dictates of NEPA. While it spoke expressly only of judicial determination that the time for an EIS was ripe, 156 U.S.App.D.C. at 410, 481 F.2d at 1094, the principle and *SIPI's* holding apply as well for judicial determination that the Government is engaged in "major federal action." Therefore, while in the first instance it is for the Government to decide whether an impact statement is necessary, where the Government improperly fails to treat the cumulative effect of individual actions as a "major federal action" it is appropriate for the courts to intervene, and do so sufficiently early that the purposes of NEPA are not thwarted.

We think that in a case like this, where appellants allege the individual federal steps taken in the Northern Great Plains, considered together, constitute a major federal action, a case or controversy is stated when the challenged individual actions are alleged, along with a reasonable basis for treating them cumulatively under NEPA, and there is a claim that "significant resources are being committed." 156 U.S.App.D.C. at 403 n. 29, 481 F.2d at 1086 n. 29. We think appellants have met this test. As in *SIPI*, the issue they raise is "whether an impact statement on [development of the Northern Great Plains] is *presently* required under NEPA." *Id.* (emphasis in original). On this issue, there is "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality." Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273, 61 S.Ct. 510, 512, 85 L.Ed. 826 (1941). *See also*

Abbott Laboratories v. Gardner, 387 U.S. 136, 148–149, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967); Eccles v. Peoples Bank, 333 U.S. 426, 434, 68 S.Ct. 641, 92 L.Ed. 784 (1948); Ashwander v. TVA, 297 U.S. 288, 324, 56 S.Ct. 466, 80 L.Ed. 688 (1936). Thus we think a justiciable case or controversy has been stated and the District Court erred in holding otherwise. Of course, the fact that appellants do not fully prevail on the merits does not operate, retroactively, to expunge the controversy.

The second preliminary issue concerns appellants' standing to sue. Appellants alleged, Complaint ¶¶ 3–9, App. 3–5, and the District Court found, that "[m]any members of plaintiff organizations live, work, engage in recreational activities, own land and hold surface rights on or immediately adjacent to the sites of coal mining and related activities in the four-state area * * *."
Fdg. 1, App. 233. Appellants further alleged that development of coal resources in the Northern Great Plains would cause direct harm to various of their members' economic, environmental, recreational, and aesthetic interests in the Region. Complaint, ¶¶ 10, 37. App. 5, 20–21. Such "injury in fact," if proved, plainly meets the broad test of standing outlined in Sierra Club v. Morton, 405 U.S. 727, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972), and applied in United States v. SCRAP, 412 U.S. 669, 93 S. Ct. 2405, 37 L. Ed. 2d 254 (1973). *See also SIPI*, *supra* note 15, 156 U.S. App. D.C. at 403 n. 29, 481 F. 2d at 1086 n. 29. In this case, however, standing can be deemed to have been proved only by appellant Northern Plains Resource Council (NPRC). The issue of standing as to all appellants was raised by the denials of the federal appellees, and of various intervenor appellees as well. Answer of federal appellees, ¶¶ 3–10, 37, App. 100, 109. *See*, *e.g.*, answer of intervenor Nebraska Public Power District, ¶¶ 3–4, App. 138–139. Nonetheless, except for the NPRC, no appellant introduced any evidence to prove its standing, and the District Court made no express finding that any appellant had standing, presumably because there was no challenge to appellants' standing in appellees' motion for summary judgment. Of course, standing to sue is an essential element of a cause of action and must be "demonstrated" as well as "alleged," particularly where controverted. *SIPI*, *supra* note 15, 156 U.S. App. D.C. at 403 n. 29, 481 F. 2d at 1086 n. 29. *See also* United States

III

NEPA's applicability to the cumulative effect of individual actions was an early issue in the impact

v. SCRAP, *supra*, 412 U.S. at 689–690, 93 S. Ct. 2405. On remand to the District Court appellants may introduce evidence of their standing to allow the District Court the opportunity to rule on the issue if appellees continue to deny it. *Cf.* Sierra Club v. Morton, *supra*, 405 U.S. at 735 n. 8, 92 S. Ct. 1361.

NPRC introduced into evidence two affidavits from its Vice Chairman, Christopher Muller. The affidavits related directly to the proposed Westmoreland Resources coal mine on Crow-ceded land. *See* note 15 *supra*. Muller identifies those members of his organization who reside in the vicinity of the proposed mine and the adverse environmental, aesthetic, and economic effects on those members of continued construction of the mine. Affidavits of Christopher Muller, Nov. 7, 1973 and Dec. 21, 1973. While appellees attempted to controvert the Muller affidavits with the affidavit from W. J. Connelly of Westmoreland Resources asserting that the adverse effects on appellants were minimal, Affidavit of W. J. Connelly, Jan. 11, 1974, it is clear that minimal "injury in fact" is sufficient for standing. United States v. SCRAP, *supra*, 412 U.S. at 688–690, 93 S. Ct. 2405. *See also* New Jersey Chapter, Inc., A.P.T.A., Inc. v. Prudential Life Ins. Co., 163 U.S. App. D.C. ——, ——, 502 F. 2d 500, 504 (1974) ("Standing need not be founded on a rock; a pebble or even a cobweb may do.") That there will be at least minimal injury is uncontroverted. Of course, the fact that an impact statement has been approved for the Westmoreland mine, *see* note 15 *supra*, does not affect appellants injury, nor does it deprive them of standing to seek a comprehensive statement for the entire Region, since the injury caused them by development of the Westmoreland mine is part of the injury regional development would cause. Since appellant NPRC has demonstrated "injury in fact," and since it does not appear to be contested that the injury is within the zone of interests intended to be protected by NEPA, *see* Data Processing Service v. Camp, 397 U.S. 150, 90 S. Ct. 827, 25 L. Ed. 2d 184 (1970), and Barlow v. Collins, 397 U.S. 159, 90 S. Ct. 832, 25 L. Ed. 2d 192 (1970), we hold that NPRC had standing to bring the suit below, and to bring this appeal.

statement cases, and has continued to require definition to date.[21] An environmental impact statement is only required, of course, for "proposals for legislation and other *major Federal actions* significantly affecting the quality of the human environment * * *." Section 102(2)(C), 42 U.S.C. § 4332(2)(C) (emphasis added). While the meaning of "legislation" is fairly clear, the precise content of "major Federal actions" is often open to question, and was, apparently purposely, enacted by Congress without definition. When an individual project—a dam, a highway, a parking plan—crossed the boundary line from minor to major action was the first issue presented to the courts, and it was one capable of fairly ready resolution. *See, e. g.*, Scherr v. Volpe, 7 Cir., 466 F. 2d 1027 (1972); Citizens Organized to Defend Environment, Inc. v. Volpe, S.D. Ohio, 353 F. Supp. 520 (1972); Monroe County Conservation Council, Inc. v. Volpe, 2 Cir., 472 F. 2d 693 (1972); Crary v. Morton, D.D.C. (Civ. No. 75–1023, order issued Feb. 11, 1975).

More difficult, but also readily resolved, was the question whether the cumulative effect of various federal actions, all individually minor, could together constitute a "major federal action." The courts, aided by the Guidelines of the Council on Environmental Quality (CEQ), the body established by NEPA to review agency compliance with Sections 101 and 102 of

[21] A related problem, essentially the converse of this one, is determining when a major action should be segmented into smaller actions so as to allow filing an impact statement for the smaller actions. *See, e.g.*, Named Individual Members of San Antonio Conservation Society v. Texas Highway Department, 5 Cir., 446 F. 2d 1013 (1971); Natural Resources Defense Council v. Morton, D.D.C., 388 F. Supp. 829 (1974); Committee to Stop Route 7 v. Volpe, *supra* note 20. *Cf.* Indian Lookout Alliance v. Volpe, 8 Cir., 484 F. 2d 11 (1973).

the Act, 42 U.S.C. § 4344(3), have consistently held that the purposes of NEPA would be violated if an impact statement were not required in such cases. The Guidelines make clear that the statutory term "major Federal actions" must be assessed "with a view to the overall, cumulative impact of the action proposed, related Federal action and projects in the area, and further actions contemplated." 40 C.F.R. § 1500.6(a) (1974). *Cf.* 36 Fed. Reg. 7724 (1971) (the original guidelines).[22] The Guidelines further explain how minor federal actions can be "cumulatively considerable."

> This can occur when one or more agencies over a period of years puts into a project individually minor but collectively major resources, when one decision involving a limited amount of money is a precedent for action in much larger cases or represents a decision in principle about future courses of action, or when several Government agencies individually make decisions about partial aspects of a major action.

40 C.F.R. § 1500.6(a) (1974). This interpretation of the statutory term is eminently reasonable, both because NEPA plainly mandates comprehensive consideration of the effects of all federal actions, 42 U.S.C. § 4332(2)(A), which consideration would be defeated if impact statements were required only for *individual* projects of "major" size, and because any other inter-

[22] Although the CEQ Guidelines lack the force of law, we should "not lightly suggest that the Council, entrusted with the responsibility of developing and recommending national policies 'to foster and promote the improvement of the environmental quality,' * * * has misconstrued NEPA." Greene County Planning Board v. FPC, 2 Cir. 455 F. 2d 412, 421, cert. denied, 409 U.S. 849, 93 S. Ct. 56, 34 L. Ed. 2d 90 (1972). *See* note 24 *infra*.

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pretation would provide an escape hatch, through agency subdivision of "major" projects, from the impact statement requirement.

> Almost every project can be divided into smaller parts, some of which might not have any appreciable effect on the environment. The court would be forced to take each project apart piece by piece * * *.

People of Enewetak v. Laird, D. Hawaii, 353 F. Supp. 811, 821 (1973). Thus the courts have had no difficulty in requiring impact statements for "major Federal actions" that were no more than the cumulative effect of related minor federal actions. *See e.g.,* Natural Resources Defense Council v. Grant, E.D.N.C., 341 F. Supp. 356, 367 (1972); People of Enewetak v. Laird, *supra*; Minnesota PIRG v. Butz, D. Minn., 358 F. Supp. 584, 622 (1973); SCRAP v. United States, D.D.C., 346 F. Supp. 189, 200 (1972) (three-judge court), reversed on other grounds, 412 U.S. 669, 93 S. Ct. 2405, 37 L. Ed. 2d 254 (1973) ("the necessity of preparing an impact statement cannot be avoided or postponed * * * by breaking [the action] into minute component parts"). *Cf.* Named Individual Members of San Antonio Conservation Society v. Texas Highway Department, 5 Cir., 446 F. 2d 1013, 1022 1023, cert. denied, 403 U.S. 932, 91 S. Ct. 2257, 29 L. Ed. 2d 711 (1971).

The next problem to reach the courts involving cumulative impact of related activities was also the logical next step. If the cumulative effect of individually minor federal actions could constitute a major federal action, could the cumulative impact of admittedly major federal actions do so as well? Even if individual impact statements were being prepared for

the individual actions, would a comprehensive statement for the cumulative action also be necessary? The answer was provided by this court's *SIPI* decision. Finding no distinguishing principle separating assessment of the cumulative impact of individually minor actions from the cumulative impact of individually major actions, we held that NEPA's impact statement requirement is not limited to individual projects. Rather, in *SIPI* we demanded that the Atomic Energy Commission prepare a comprehensive impact statement for its Liquid Metal Fast Breeder Reactor (LMFBR) program, even though an individual statement had been prepared for the one existing fast breeder demonstration plant and even though the Commission planned to issue an individual statement for each future plant and test facility within the program.

> The Commission takes an unnecessarily crabbed approach to NEPA in assuming that the impact statement process was designed only for particular facilities rather than for analysis of the overall effects of broad agency programs. Indeed, quite the contrary is true.

156 U.S. App. D.C. at 402–403, 481 F. 2d at 1086 1087. *See also* Natural Resources Defense Council v. Morton, *supra* (emphasizing the need for compreshensive environmental planning). *SIPI's* approach is firmly echoed by a contemporaneous First Circuit decision. In Jones v. Lynn, 1 Cir., 477 F. 2d 885 (1973), the court held that preparation of impact statements on individual buildings within an urban renewal project would be both impractical and, unless the individual statement evaluated the "cumulatively significant impact" of the entire federal role in the project, in violation

of NEPA. Instead a comprehensive statement was required.

> [I]t would not seem sensible to adopt the piecemeal approach which HUD seeks to adopt, whereby it will prepare a modified impact statement separately for each proposed construction as a mortgage insurance application is filed, an approach akin to equating an appraisal of each tree to one of the forest.

Id. at 891. *See also* Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation, 2 Cir., 508 F. 2d 927 (1974).

We think *SIPI's* holding that statements are necessary for "broad agency programs" in addition for "broad agency programs" in addition to "particular facilities" was firmly based, and we reaffirm it here. We do not understand appellees to dispute *SIPI's* validity. In fact, we note that, in compliance with the CEQ Guidelines and with *SIPI,* Interior has itself decided a national coal programmatic statement is necessary to assess the broad impact of its national coal development policy.[23] Likewise, when confronted with applications for approval of four mining plans and a railroad right-of-way in one subregion of the Northern Great Plains, the Eastern Powder River coal basin, Interior properly decided to assess the cumulative environmental impact of the individual

[23] It is not suggested by appellees that this national programmatic statement is sufficiently detailed to substittue for a regional statement covering the Northern Great Plains, and our examination of the draft statement makes it clear that it is not. *Cf.* Natural Resources Defense Council v. Morton, *supra* note 21. For the limitations of the national statement, *see* Draft Environmental Impact Statement, Proposed Federal Coal Leasing Program at I–6, I–7. *Cf.* note 15 *supra.*

projects through a regional impact statement. *See* note 15 *supra.*

In *SIPI* the AEC admitted it was engaged in the LMFBR program. We must now decide whether to extend *SIPI* to require comprehensive impact statements in situations where the responsible agencies deny they are engaged in a broad program. Appellants would have us hold that an impact settlement is necessary in this case "precisely because the federal agencies have not prepared any plan for coal development in the Northern Great Plains." Appellants' brief at 47. They rely primarily on the following provision from the CEQ Guidelines:

> Agencies should give careful attention to identifying and defining the purpose and scope of the action which would most appropriately serve as the subject of the statement. In many cases, broad program statements will be required in order to assess the environmental effects of a number of individual actions on a given geographical area (e.g., *coal leases*), or environmental impacts that are generic or common to a series of agency actions (e.g., maintenance or waste handling practices), or the over-all impact of a large-scale program or chain of contemplated projects (e.g., major lengths of highway as opposed to small segments). Subsequent statements on major individual actions will be necessary where such actions have significant environmental impacts not adequately evaluated in the program statement.

40 C.F.R. § 1500.6(d)(1)(1974) (emphasis added). Appellants read these guidelines to require a comprehensive impact statement whenever a group of individual federal projects are related geographically, environmentally, or programmatically. After extensive

analysis of federal activities in the Northern Great Plains, appellants conclude "the projects and federal actions relating to coal development in the Northern Great Plains region are related in all three of these ways." Appellants' brief at 33: Appellees argue that a statement is required only when the Government has itself designated the activities at issue a "program." They claim the CEQ Guidelines support this approach arguing that reference to the need for "broad *program* statements" means the Guidelines only define when broad statements are needed in pre-existing programs. Intervenor appellees' brief at 31 n. 1.

We reject appellees' constricted reading of the Guidelines. Whether a comprehensive impact statement is required cannot turn simply on whether the agency has denominated a comprehensive series of actions a "program." This argument is analogous to that in the early NEA cases when agencies denied that related minor actions constituted, *in toto,* a major action. We did not hesitate at that time in holding that major actions were involved despite the agency denials; where appropriate, we will not hesitate now. The fact of an agency denial does not end the controversy, but rather points to why the controversy exists. Surely the result in *SIPI* would have been no different had the AEC simply denied that a comprehensive program was involved, all the other underlying facts being the same. At a minimum, the courts must reserve the right to analyze federal actions to determine if, in fact, a comprehensive program, however labeled, is under way or proposed. *See* SCRAP v. United States, *supra,* 346 F. Supp. at 200.

This conclusion is firmly supported by the recent Second Circuit decision in Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation, *supra.* In *Conservation Society* the court upheld the determination of the District Court that the Department of Transportation could not proceed with improvement of a 20-mile segment of U.S. Route 7 until a comprehensive impact statement was prepared for the entire 280-mile length of Route 7. The District Court so held, although it acknowledged that there was no present plan for overall development of the road: it found, however, that ultimate conversion of Route 7 into a superhighway was a goal held by the federal defendants and that it was "possible of accomplishment with legislative and federal approval over a long-range period of time * * *." D. Vt., 362 F. Supp. 627, 636 (1972). Since ultimate conversion was the expectation of the federal defendants, and since completion of the 20-mile segment at issue would constitute an irreversible and irretrievable commitment of resources that would generate more traffic and thereby create synergistic pressure for further construction, the District Court ruled that major federal action was proposed within the meaning of Section 102(2)(C), and that the time was ripe for a comprehensive impact statement. The Second Circuit agreed.

While we thus feel firmly grounded in inquiring into the actual nature of the Government's actions, appellants would have us go further than this. Essentially, they would have the courts require filing of a comprehensive impact statement if a comprehensive program *should be* under way. Admittedly, the CEQ Guidelines, which are entitled to great respect,[24] do seem to sweep that broadly. Moreover, there

[24] "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." Udall v. Tallman, 380 U.S. 1, 16, 85 S. Ct. 792, 801, 13

are dicta in the cases suggesting that the duty to plan comprehensively can be imposed on the Government apart from the duty to file an impact statement for comprehensive plans. For instance, Natural Resources Defense Council v. Morton, *supra,* suggests:

> What NEPA infused into the decision-making process in 1969 was a directive as to environmental impact statements that was meant to implement the Congressional objectives of Government coordination, *a comprehensive approach to environmental management,* and a determination to face problems of pollution "while they are still of manageable proportions and while alternative solutions are still available" *rather than persist in environmental decision-making wherein "policy is established by default and inaction" and environmental decisions "continue to be made in small but steady increments" that perpetuate the mistakes of the past without being dealt with until "they reach crisis proportions."* S. Rep. No. 91–296, 91st Cong., 1st. Sess. (1969) p. 5.

L. Ed. 2d 616 (1965). *See also* Rosado v. Wyman, 397 U.S. 397, 415, 90 S. Ct. 1207, 25 L. Ed. 2d 442 (1970), Zuber v. Allen, 396 U.S. 168, 192, 90 S. Ct. 314, 24 L. Ed. 2d 345 (1969). While CEQ is not strictly charged with administration of NEPA it is charged with the duty of reviewing and appraising agency compliance with the statute, and so is entitled to deference, 42 U.S.C. § 4344(3). This deference is heightened when, as here, the administrative interpretation is adopted soon after passage of the legislation. Power Reactor Development Co. v. International Union of Electricians, 367 U.S. 396, 408, 81 S. Ct. 1529, 6 L. Ed. 2d 924 (1961); United States v. Zucca, 351 U.S. 91, 96, 76, S. Ct. 671, 100 L. Ed. 964 (1956); United States v. American Trucking Ass'ns, 310 U.S. 534, 549 (1940). Accordingly, the courts have consistently deferred to CEQ guidelines. *See SIPI, supra* note 15, 156 U.S. App. D.C. at 402–404, 481 F. 2d at 1086–1088; Greene County Planning Board v. FPC, *supra* note 22, 455 F. 2d at 421; Environmental Defense Fund v. TVA, 6 Cir., 468 F. 2d 1164, 1178 (1972). *See* note 22 *supra.*

148 U.S. App. D.C. at 14, 458 F. 2d at 836 (emphasis added). Viewed broadly, this language plainly contemplates *imposing* a requirement of comprehensive planning on the Government when it refuses to do so itself. Indeed, NEPA does declare it federal policy "to use all practicable means * * * *to improve and coordinate Federal plans,* functions, programs and resources" in order to protect the environment. Section 101(a), 42 U.S.C. § 4331(a). NEPA's substantive provisions may be enforced in court as well as its procedural requisites.[25] *See* Calvert Cliffs' Coordinating Committee v. AEC, *supra,* 146 U.S. App. D.C. at 38, 449 F. 2d at 1114. Agency violation of this substantive duty by a failure to improve its plans or coordinate its actions might justify a judicial directive to coordinate various major federal actions into one comprehensive major federal action, followed by a directive ordering issuance of a comprehensive impact statement for that newly-comprised action.

While we approve, in theory, the legal basis for appellants' argument, we note the practical difficulties in its broad application. An infinite number of geo-

[25] Six circuits have found that agency action in violation of the substantive provisions of NEPA may be enjoined. However, the action must be found to be arbitrary or capricious. *See* Calvert Cliffs' Coordinating Committee, Inc. v. AEC, 146 U.S. App. D.C. 33, 39, 449 F. 2d 1109, 1115 (1971); Environmental Defense Fund v. Corps of Engineers, 8 Cir. 470 F. 2d 289, 300 (1972); Sierra Club v. Froehlke, 7 Cir. 486 F. 2d 946, 953 (1973); Conservation Council of North Carolina v. Froehlke, 4 Cir., 473 F. 2d 664, 665 (1973); Silva v. Lynn, 1 Cir., 482 F. 2d 1282, 1283 (1973); Jicarilla Apache Tribe of Indians v. Morton, 9 Cir. 471 F. 2d 1275, 1281 (1973). *Contra,* National Helium Corp. v. Morton, 10 Cir., 455 F. 2d 650 (1971). Thus an agency could not be found to have failed to plan comprehensively in violation of NEPA unless that failure was so gross as to be arbitrary and capricious.

graphic, environmental, or programmatic interrelationships might be found among the various individual federal projects under way throughout the country. Surely, however, an infinite number of comprehensive plans, and comprehensive impact statements, are not required. Moreover, the Guidelines are intended to guide agency planners in the need for impact statements. It is, of course, the agencies that are supposed to organize the various federal projects throughout the country, not litigants who come into court seeking, possibly in opposition to one another, to force the agencies into action according to their lights; one might seek, for instance, a coal impact statement for the Northern Great Plains, another for the four-state region, and another for the state of Wyoming alone. Use of NEPA to force a comprehensive plan on an unwilling agency as a means to force that agency to undertake a comprehensive impact statement might intrude unduly on agency discretion, while overly involving the courts in the day-to-day business of running the Government.

This is not to say appellants' claim is without merit. We have noted above the persuasiveness of their legal arguments. Since the courts would only find an agency to be in violation of the substantive provisions of NEPA if its failure to plan comprehensively was arbitrary or capricious, the dangers suggested above would be minimized.[26] And there may be instances where judicial intervention is justified. Surely we are not willing to hold that the less comprehensive planning an agency chooses to do, the less NEPA requires it to do. Such a *reductio ad absurdum* would make a mockery of the Act. However, we need not decide ap-

[26] *See* note 25 *supra*.

pellants' claim here. We think the facts in the record and as found by the District Court establish that regional development of the Northern Great Plains is contemplated by the federal appellees. The proposal for such development would constitute a proposal for major federal action within the meaning of Section 102(2)(C) and demand issuance of a comprehensive regional impact statement.

It is beyond question that federal action within the meaning of the statute includes not only action undertaken by the agency itself, but also any action permitted or approved by the agency. *SIPI, supra,* 156 U.S. App. D.C. at 404, 481 F. 2d at 1088. Approving leases to private parties and granting licenses or permits to private parties are familiar—and well-established—examples of major federal actions. *See, e.g.,* Davis v. Morton, 10 Cir. 469 F. 2d 593 (1972); Greene County Planning Board v. FPC, *supra;* Scenic Hudson Preservation Conference v. FPC, 2 Cir., 453 F. 2d 463 (1971); Calvert Cliffs' Coordinating Committee v. AEC, *supra.* It is clear, and we do not understand the federal appellees to contest it, that most, if not all, of the ongoing and pending actions in the Northern Great Plains are subject to federal approval and are thereby federal actions. That these actions are major and that they significantly affect the human environment is also not contested. Certainly actions in the Region subject to Section 102(2)(C) include the approving of mining plans, the granting of rights-of-way across federal lands, and the granting of water rights from federal reservoirs. Thus the relevant question is not whether major federal actions are being taken in the Northern Great Plains, nor is it whether impact statements are necessary for those actions. The question is whether the federal appellees have treated those

actions regionally in such a way that they comprise, cumulatively, a major federal action.

We believe the evidence mandates an affirmative answer.

The evidence is overwhelming that the federal appellees have for years been endeavoring to develop a plan for regional development of the coal resources in the Northern Great Plains. The North Central Power Study, the Montana-Wyoming Aqueducts Study, and the Northern Great Plains Resources Program were all undertaken for this purpose. The purpose of the aborted North Central Power Study was "to promote the coordinated development of electric power supply in the North Central United States." *Id.*, Report of Phase I, Volume I, at 2 (1971). The "key resource" for development of that power supply was coal. *Id.* The stalled Aqueduct Appraisal Report, after recommending construction of large-capacity aqueducts to serve the industrial needs resulting from development of the coal fields, concluded:

> The apparent impact of the development will require that full-scale comprehensive studies be initiated in the near future, in cooperation with the states and others, to assure an orderly and manageable growth pattern to minimize adverse environmental effects and impacts.

Id. at 31 (1972). Now the NGPRP is under way, an interagency, federal-state task force whose primary objective is "to provide information and a comprehensive analysis that can be used to place the potential impacts of coal development into perspective and thereby assist the people of the Northern Great Plains and the Nation in the management of the natural and human resources of this region." NGPRP Draft Interim Report at I–4 (1974). Secretary Morton tells

us that all three of these programs were "attempts to control development by individual companies." Affidavit of Secretary Morton, App. 190. The District Court accepted this assertion as fact. Fdg. 14, App. 237.

The need for comprehensive regional development of the Northern Great Plains was recognized by responsible officials in the various agencies that subsequently became involved in the NGPRP. On May 2, 1972 Secretary of Agriculture Butz wrote to the Administrator of the Environmental Protection Agency with reference to coal development in the Northern Great Plains: "We agree that a comprehensive, systematic, and interdisciplinary study of all aspects of the development and use of our coal reserve is needed." App. 75. On July 6, 1972 he wrote to Senator Mansfield, again with reference to the Northern Great Plains: "[T]here is considerable urgency and need for a coordinated mineral development strategy." App. 74. Likewise, on November 2, 1972 the Chief of the Forest Service wrote to Senator Mansfield concerning coal leasing in the national forest in the Region. He reported that "a prerequisite to further leasing should be a plan for coordinated development consistent with adequate environmental protection and the public interest." App. 78, 119 Cong. Rec. 1504 (1973). The same year Assistant Secretary of the Interior for Public Land Management Harrison Loesch told a congressional committee that "[w]e are presently investigating the necessity, and we think it is a necessity, of rather comprehensive study and planning effort in the large coal basins of Montana and Wyoming." Federal Leasing and Disposal Policies, Hearing Before the Senate Committee on Interior and Insular Affairs, 92d Cong., 2d Sess., 85 (1972).

The NGPRP is the federal response to these expressed concerns. It is the Government's attempt to formulate a regional program that will enable it to control development of the Northern Great Plains. This is demonstrated not only by the stated goals of the program itself, *see* slip op. at 747, 748 *supra,* —— U.S. App. D.C. at ——, —— F. 2d at ——, but by the suspension of activity in the Region pending its completion, by the comments of responsible officials, and by the findings of the District Court. In setting up the NGPRP in 1972, Secretary Morton described it as "an excellent opportunity for this Department to demonstrate how a responsible Federal agency can manage resources development with proper regard for environmental protection." App. 200; *see* slip op. at 733 *supra,* —— U.S. App. D.C. at ——, —— F. 2d at ——. In responding to quetions about development of the Region posed by a congressional committee, Interior provided this statement:

> An assurance of orderly and timely development would require an analysis and assessment of such items as regional coal demand and the relationship to existing leases. The Department is initiating a State, local and Federal program to develop a regional development plan or framework for the Montana, Wyoming, North Dakota and South Dakota area associated with the Powder River and Fort Union coal formations. The objective is the wise development of the region accomplished in full realization of social, economic and ecological consequences of alternative possibilities.

Federal Leasing and Disposal Policies, Hearing Before the Senate Committee on Interior and Insular Affairs, 92d Cong., 2d Sess., 189 (1972). The program mentioned obviously was the NGPRP. Lastly, the District Court found that the interim report of the NGPRP

> will provide an informational foundation for decision-making and planning. This information will be utilized in decision-making for all coal related actions in the Northern Great Plains areas and will form a useful reference source for preparing environmental analyses and statements on proposed actions or groups of actions in the Northern Great Plains area.[27]

However, while the NGPRP does attempt to provide a framework for decision-making to allow the federal government to control development of the Northern Great Plains, it plainly recognizes the need, which it does not fill, for cumulative study of the environmental impact of that development.[28] The draft

[27] The court also found "The purpose of the Department of Interior policy with respect to resource development in the Northern Great Plains Areas is to insure that development does not proceed based solely on single purpose studies incapable of developing comprehensive information or by piecemeal actions which restrict future options. To fulfill that purpose the granting or approval of leases, special use permits and all types of rights-of-way across public lands, the delivery and sale of water and approval of mining plans relating to coal development in the Northern Great Plains areas will be held in abeyance pending the availability and analysis of the interim report from the NGPRP study or submitted to the Under Secretary of Interior for review and concurrence prior to execution." Fdg. 25, App. 241.

[28] The Environmental Protection Agency has also recognized the need for cumulative environmental consideration of the Region. Exercising his statutory and regulatory duty to review and comment on major agency actions to which § 102(2)(C) applies, *see* 42 U.S.C. § 1857h–7(a). 40 C.F.R. § 1500.9(a) (1974), the EPA Administrator, in identical letters to the Secretaries of the Interior and Agriculture, stated with regard to development of the Northern Great Plains: "Environmental im-

interim report asks, "Is the impact of two mines or powerplants in the same area twice as great as the impact of one, or is it larger?" It warns, "[T]he impacts of coal development in the Northern Great Plains may be greater than the projection and analytic techniques used have been able to delineate." NGPRP Draft Interim Report at V–2. The NGPRP does not purport to provide answers to these problems. We believe, however, that NEPA requires those answers be found.

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pact statements prepared on a project-by-project basis in accordance with the National Environmental Policy Act are not adequate to evaluate the overall regional impact. What is needed is a comprehensive, systematic and interdisciplinary study of coal development in this region, similar to the Southwest Energy Study and the oil shale development program, which satisfies the letter and spirit of the National Environmental Policy Act."
App. 82.

The dissent suggests the various projects contemplated in the Northern Great Plains are essentially independent of one another, so that a commitment to one project entails no consequences for another. Thus there is no need for comprehensive environmental planning, and *SIPI* and Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation, 2 Cir., 508 F.2d 927 (1974), are inapposite. Dissent slip op. at 761–763 *infra*. —— U.S.App.D.C. at ——, —— F.2d at ——. We disagree. To cite two examples beyond those suggested above, the availability of water and manpower in the Region is limited. Coal mining is crucially dependent upon both. Thus development of one mine is considerably more than an irretrievable commitment to that mine. In the case of water supply, it forecloses the possibility of another, environmentally preferable mine. In the case of manpower, it creates pressure for a population influx which, while minor for one mine, may be cumulatively considerable. As *SIPI and Conservation Society* tell us, it is these sorts of environmental effects that can be best addressed in a regional, comprehensive manner. *See also* note 31 infra.

It is our view that when the federal government, through exercise of its power to approve leases, mining plans, rights-of-way, and water option contracts, attempts to "control redevelopment" of a definite region, it is engaged in a regional program constituting major federal action within the meaning of NEPA, whether it labels its attempts a "plan," a "program," or nothing at all. Thus, supported by the *Conservation Society* precedent and based on the evidence presented to the District Court and the facts as found by the District Court, we hold that comprehensive major federal action is contemplated in the Northern Great Plains. The District Court's contrary conclusion of law was in error.[29]

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[29] The cases relied upon by appellees and the District Court to show that no impact statement is required for a regional plan such as the NGPRP are all inapposite. Every cited case involved the propriety of an injunction against an individual project pending completion of a regional EIS or other study. None of the cases involved a direct challenge to the need for a regional EIS. *See* Sierra Club v. Callaway, 5 Cir., 499 F.2d 982 (1974); Jicarilla Apache Tribe of Indians v. Morton, *supra* note 25; Indian Lookout Alliance v. Volpe, *supra* note 21; Sierra Club v. Stamm, 10 Cir., 507 F.2d 788 (1974); Trout Unlimited v. Morton, 9 Cir., 509 F.2d 1276 (1974); Environmental Defense Fund v. Armstrong, N.D.Cal., 356 F.Supp. 131, aff'd, 9 Cir., 487 F.2d 814 (1973); Movement Against Destruction v. Volpe, D.Md., 361 F.Supp. 1360 (1973); Sierra Club v. Froehlke, S.D.Tex., 359 F.Supp. 1289, 1324–1325 (1973); Conservation Council of North Carolina v. Froehlke, M.D.N.C., 340 F.Supp. 222, 227 (1972), remanded, 4 Cir., 473 F.2d 664 (1973).

Of course whether an injunction will issue in such a case depends on many factors in addition to whether a regional EIS is required, including the state of construction of the challenged project and the comprehensiveness of the impact statement for that project. *See* Sierra Club v. Callaway, *supra*, 499 F.2d at 987. Thus whether a regional EIS is required was not determin-

ative for resolution of the cited cases. Moreover, many of the cases did not even raise the issue of a regional impact statement, but merely sought delay of an individual project until completion of a regional *study* that might be of some assistance in preparing the individual statement. This was the situation in Jicarilla Apache Tribe of Indians v. Morton, *supra*, note 25, relied on most heavily by appellees. There plaintiffs sought to delay four individual coal-fired electric generating projects in four southwestern states pending issuance of the Southwest Energy Study. The court sensibly rejected the claim: "If we were to impose a requirement that an impact statement can never be prepared until all relevant environmental effects were known, it is doubtful that any project could ever be initiated." 471 F.2d at 1280. Even appellees concede that there was no claim made in *Jicarilla* that a region impact statement was necessary. Intervenor appellees' brief at 28.

Likewise, in Environmental Defense Fund v. Armstrong, *supra*, also heavily relied upon by appellees, the need for a regional statement was not at issue. Plaintiffs there sought a "comprehensive study," not an EIS, of the Central Valley Project before approval of the New Melones dam impact statement. The court refused to wait for the study, noting that "no comprehensive study has been commenced, let alone completed." 356 F.Supp. at 139. This is in sharp contrast to this case where a comprehensive study is under way, and the need for a comprehensive statement is at issue.

In Sierra Club v. Callaway, *supra*, the Fifth Circuit refused to delay the Wallisville Project pending a comprehensive EIS for the entire Trinity Basin Project. The holding was based on its findings that Congress intended the two projects to be treated separately, that the Wallisville Project was not, in fact, a component of the Trinity Basin Project, that the Wallisville Project was 72% complete while the Trinity Basin Project might not be completed for 40 to 50 years, and that the Wallisville Project was well under way before the effective date of NEPA. Thus Sierra Club v. Callaway is full distinguishable; there was no comprehensive plan at all.

This crucial dependence upon the facts of the case was stressed in Sierra Club v. Stamm, *supra*, also heavily relied upon by appellees. Whether the Strawberry Aqueduct and Collection System was itself a major federal action or merely a component of

the larger Bonneville Unit, or the entire Central Utah Project, was a question of fact as well as law, and turned crucially on "the 'facts' as * * * found by the trial court * * *." 507 F.2d at 791. The Tenth Circuit agreed "with the trial court that the Strawberry system in and of itself constitutes a 'major Federal action' and that it is not a mere increment of either the Bonneville Unit or the Central Utah Project requiring a final impact statement for something more than the Strawberry system before work may be commenced on the Currant Creek Dam."

Id. at 792 793. Again we note this case was in the context of a challenge to the individual project and did not involve the question whether a comprehensive EIS was necessary on its own merits. Moreover, the Tenth Circuit found the facts sufficient to treat the Strawberry System apart from the overall project. To the extent, however, that the Tenth Circuit proceeded on the assumption that only one "major Federal action" could be found, either the entire Bonneville Unit, the entire Central Utah Project, or the Strawberry System, we disagree. It is clear to us that a major federal action may require an impact statement for itself and still be a part of a larger major federal action that also requires a statement. That was the holding of *SIPI*, and we adhere to it. To the extent Sierra Club v. Stamm is contrary, we decline to follow it.

The last important case cited to us by appellees is Trout Unlimited v. Morton, *supra*. There the Ninth Circuit held that an EIS prepared for the First Phase of the Lower Teton Division of the Teton Basin Project was adequate despite the fact that it did not attempt to analyze the environmental impacts of the Second Phase. The court distinguished the case before it from cases requiring comprehensive impact statements by noting that the First Phase was "substantially independent" of the Second, that approval of the Second was not a foregone conclusion since approval of the Secretary of the Interior and the Congress had yet to be obtained, and that the First Phase would be fully functional even if the Second were never built. We think those distinguishing factors fully distinguish *Trout Unlimited* from the instant case where the thrust of appellants' complaint is that widespread development of the Northern Great Plains is virtually certain to occur, and that the effects of the individual projects can only be meaningfully assessed in cumulative terms.

IV

Our conclusion that major federal action is contemplated in the Northern Great Plains does not mean, *ipso facto,* that a comprehensive regional impact statement is required. A statement must precede the "recommendation or report on *proposals* for * * * major Federal actions." Section 102(2)(C), 42 U.S.C. § 4332 (2)(C) (emphasis added). This raises the question of timing that was so critical in *SIPI*. We think it patent that the term "proposals" does not encompass every suggestion, however unlikely to reach fruition, made by a federal officer. Certainly federal officers are entitled to dream out loud without filing an impact statement. Thus we think it proper to inquire, before an EIS is required, whether the proposal for action has progressed beyond the "dream" stage into some tangible form so that the time for an impact statement is ripe. *SIPI, supra,* 156 U.S. App. D.C. at 409–410, 481 F. 2d at 1093–1094. We should note, however, that the "ripeness" necessary before a statement is required is slight. Preparation of a statement must precede, or at least accompany, preparation of the recommendation or report on the proposal, so that the agency may have the opportunity to assess the environmental impact of its plans before committing itself, even tentatively, to action. An impact statement is designed to aid agency decision-making, not provide an *ex post facto* justification for it. We fully adhere to our statement in Calvert Cliffs' Coordinating Committee v. AEC, *supra,* that

> [c]ompliance [with NEPA demands] that environmental issues be considered at every important stage in the decision making process concerning a particular action—at every stage where an overall balancing of environmental

> and nonenvironmental factors is appropriate and where alterations might be made in the proposed action to minimize environmental costs.[20]

146 U.S. App. D.C. at 42, 449 F. 2d at 1118. But, as *SIPI* tells us,

> [W]e are pulled in two directions. Statements must be written late enough in the development process to contain meaningful information, but they must be written early enough so that whatever information is contained can practically serve as an input into the decision making process.

156 U.S. App. D.C. at 410, 481 F. 2d at 1094.

The problem *SIPI* notes with regard to research and development programs applies with like force to defining any "proposal" within the meaning of Section 102(2)(C). *SIPI* identified four balancing factors that must be analyzed and weighed to determine if the time is ripe for an impact statement. *Id. Cf.* 40 C.F.R. § 1500.6(d)(2). With minor modifications to make the factors applicable to all federal actions and not just the research and development program at issue in *SIPI,* we adopt those factors here. Thus the agency, or the reviewing court, should inquire as follows: How likely is the program to come to fruition, and how soon will that occur? To what extent is meaningful information presently available on the effects of implementation of the program, and of alternatives and their effects? To what extent are irretrievable commitments being made and options precluded as refinement of the proposal progresses? How severe will be the environmental effects if the program is implemented?

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[20] Compliance with the substantive demands of § 102(2)(A) and (D) is required, of course, even before an impact statement is necessary under § 102(2)(C).

As we pointed out in *SIPI,* application of this test is in the first instance a task for the agency, since answering the questions, and balancing the answers, clearly requires agency expertise. *See id. See also* Citizens Ass'n of Georgetown, Inc. v. Zoning Comm'n of D.C., 155 U.S. App. D.C. 233, 239, 477 F. 2d 402, 408 (1973); Wilderness Society v. Morton, 156 U.S. App. D.C. 121, 145, 479 F. 2d 842, 866 (1973) (*en banc*). While judicial scrutiny of an agency decision that the time is not yet ripe for a statement is, of course, appropriate, *SIPI, supra,* 156 U.S. App. D.C. at 410, 481 F. 2d at 1094, our analysis of the balancing factors is inconclusive at this time and, because we are told that appellees are about to resolve certain dispositive uncertainties, we remand this case to the District Court to allow the federal appellees initially to make their own determination.

We find from the record from the District Court ample evidence suggesting that, as for two of the balancing factors, the time for a statement is indeed ripe. Meaningful information on the effects of development of coal resources in the Northern Great Plains, and of alternatives to that development, is certainly available, although not yet compiled and analyzed. Of course it is the mere availability of such information that matters; compilation and analysis are the purpose of the impact statement itself.[31] Like-

[31] The extreme importance of prompt analysis of the effects of massive coal development of the Northern Great Plains is emphasized by the NGPRP, which does not attempt to engage in such detailed analysis: "Considerable uncertainty remains regarding the socio-economic impacts of coal development in the Northern Great Plains. Because of the complex nature of coal development, it is extremely difficult to estimate or assess cumulative impacts. However, these impacts may be critical. Is the impact of two mines or powerplants in the same area twice as great as the impact of one, or is it larger? Furthermore, how

wise the severity of the environmental effects of massive coal development of the Northern Great Plains is clear and inclines us toward a finding of ripeness. There is no need to expound on the effects here.[32] Briefly put, a region best known for its abundant wildlife and fish, and for its beautiful scenery, a region isolated from urban America, sparsely populated and virtually unindustrialized, will be converted into a major industrial complex.

Weighing the other two balancing factors is not so clear-cut. While federal approval of development of the Northern Great Plains seems fairly certain to occur, and to occur in the relatively near future so as to lessen our dependence on imported oil, it seems to us clear that the Government has not yet finally settled on its role in granting that approval. Significantly, the relevant geographic area for development still seems somewhat uncertain.[33] Interior's broadly con-

adaptable is the socio-economic environment? Do equal increments of change require equal adjustments or do they require successively more? It is quite possible that the impacts of coal development in the Northern Great Plains may be greater than the projection and analytic techniques used have been able to delineate. NGPRP Draft interim Report, at V. 2."

[32] The effects are described vividly in appellants' brief, and we do not understand appellees to contest their magnitude. *See* appellants' brief at 11–18.

[33] Thus, while the NGPRP covers the five states of Montana, Wyoming, North Dakota, South Dakota, and Nebraska, its projected development of the area covers only northeastern Wyoming, eastern Montana, and the western Dakotas. *See, e.g.*, NGPRP Draft Interim Report, Plate 5B, Most Probable Development Forcast [*sic*]. The North Central Power Study, on the other hand, encompassed a significantly larger area, while the Aqueduct Study covers only Montana and Wyoming. We think that, absent abuse of this power, definition of the proper region for comprehensive development and, therefore, the com-

ceived North Central Power Study collapsed, and it responded with the Northern Great Plains Resources Program. While the NGPRP is intended to guide the Government in controlling private development of the Region, the interim report is not yet completed. As the Government grapples with its role in the Northern Great Plains, it has largely suspended activity therein. Thus so long as the suspension stays in effect, irretrievable commitments are largely being avoided while appellees determine the scope of the proposed federal action.[34] On the other hand, the suspension is not abso-

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prehensive impact statement should be left in the hands of the federal appellees.

The appellees make something of an issue of the differences between the area covered by the NGPRP and the area described by appellants in their complaint. Intervenor appellees' brief at 23–24, 43–45; federal appellees' brief at 4 n. 1. The District Court also found significance in these discrepancies, ruling: "The 'Northern Great Plains region' *as described by the plaintiffs* is not an entity, region, or area which has been defined by the Federal Government by statute or executive action for purposes of any Federal program, project, or action." Fdg. 7, App. 235 (emphasis added). We find this argument to be without merit. In a case such as this, where appellants seek to have the Government acknowledge that it is treating the comprehensive development of a region as a whole, we deem it unnecessary for the complaint to define every acre of territory within the region being so treated by the Government. Precise definition of the region is one of the consequences of such a lawsuit, not a prerequisite for it. The complaint should be sufficiently precise to put the Government on notice of the scope of plaintiff's claim. That was clearly achieved here; indeed, the planning maps of the NGPRP released after initiation of this suit revealed the area defined by the appellants to describe virtually precisely the area actually considered for development by the NGPRP.

[34] It is the lack of definition of the proposal for action and the suspension of activity in the region that crucially distinguish this case from Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation, *supra* note 28, *see* slip op. at

lute; four mining plans have been approved in the past two years and four more are ready for approval, stayed only by our temporary injunction.

Thus analysis of the four balancing factors is somewhat inconclusive, inclining us simultaneously toward a finding of ripeness and a desire to stay our hand while appellees further define their roles. However, we find it unnecessary to reach a conclusive resolution of the question at this time, for the uncertainties inclining us toward restraint are about to be resolved. We are told that the final interim report of the NGPRP is about to be issued; indeed, it may have issued already. According to the federal appellees, they will then feel free to begin approving private activity in the Northern Great Plains. We think the federal appellees will also be in a position, upon issuance of the interim report, to decide more definitely upon their role in the development of the Northern Great Plains,[35] and we think we should await their definition. If, as has been their goal, that role is one of controlling

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745–746, *supra* —— U.S. App. D.C. at ——, —— F. 2d at ——. In *Conservation Society* the scope of the proposed action was clear—the entire 280-mile length of Route 7—and irretrievable commitments—the 20-mile segment under construction—were being made that would determine the course of future action. Thus the proposal was sufficiently ripe to demand preparation of a comprehensive impact statement.

[35] It is admitted that the federal appellees intend to use the NGPRP to help define the need and scope of future impact statements in the Northern Great Plains. Supp. Fdg. 6.

The fact that appellees' plans to control development of the Northern Great Plains may not spring full-blown from issuance of the NGPRP interim report is, of course, of no consequence. The impact statement is intended to aid agency planning and decision-making *before* the final recommended proposal for action is made. It is enough that the scope of the proposal is sufficiently clear that consideration of its environmental impact is possible.

development of the region, then, as we have made clear above, a comprehensive EIS should accompany the proposal for action, which presumably would be embodied in a final NGPRP report.[36] If, contrary to expectations, the federal appellees settle upon another role in the development of the Northern Great Plains, or upon no role at all, they must decide whether an impact statement is required.[37] If they decide in the negative, we will require "a statement of reasons why [they believe] that an impact statement is unnecessary." [38] Arizona Public Service Co. v.

[36] If the federal appellees decide to prepare a comprehensive regional EIS for the Northern Great Plains, it is, of course, of no consequence to us what form it takes. The EIS may be incorporated in already planned statements for individual projects, it may be subdivided into subregional statements, or it may be issued as a whole. All that matters is that a comprehensive study of the region is made. SIPI, *supra* note 15, 156 U.S. App. D.C. at 408–409, 481 F. 2d at 1092–1093; Natural Resources Defense Council v. Morton, D.D.C., 388 F. Supp. 829 (1974). *See* notes 15 & 23 *supra*.

It is likewise of no concern whether the appellees jointly prepare a comprehensive statement or whether they each prepare their own, so long as the cumulative effect of *all* the contested federal actions are fully assessed.

[37] We note that an impact statement might be required for the negative decision *not* to control development of the Northern Great Plains, as well as for the positive decision to do so. *See* Arizona Public Service Co. v. FPC, 157 U.S. App. D.C. 272, 280 n. 24, 483 F. 2d 1275, 1282 n. 24 (1973); City of New York v. United States, E.D.N.Y., 337 F. Supp. 150, 160 (1972) (three-judge court) (Friendly, J.).

[38] While we will allow the federal appellees, in the first instance, to make the decision whether a regional impact statement is necessary for the Northern Great Plains, we remind them that the requirements that such a statement issue for major federal action, even if regional in character, and that environmental factors be considered at every state of agency decision-making about such action are not inherently flexible

FPC, 157 U.S. App., D.C. 272, 279, 483 F. 2d 1275, 1282 (1973). *See also SIPI, supra,* 156 U.S. App. D.C. at 410–411, 481 F. 2d at 1094–1095; Hanly v. Kleindienst, 2 Cir., 471 F. 2d 823 (1972), cert. denied, 412 U.S. 908, 93 S.Ct. 2290, 36 L.Ed.2d 974 (1973). Accordingly, we remand this case to the District Court. The federal appellees must decide within 30 days of issuance of the NGPRP Interim Report, or the date of this opinion, whichever is later,[39] whether to prepare a comprehensive, programmatic impact statement for the Region, and they must report their decision, and the reasons for it, to the District Court.[40] If appellees decide against attempting to control development of the Northern Great Plains, they must also

or discretionary. See Calvert Cliffs' Coordinating Committee v. AEC, *supra* note 25, 146 U.S. App. D.C. at 38, 449 F. 2d at 1114. *But see* note 36 *supra*.

[39] Should, for some reason, the NGPRP interim report not issue within a reasonable time after the date of this opinion, appellants may petition this court for a further order.

[40] Secretary Morton seems to have conceded that some sort of regional or subregional statement will be necessary. "It is possible a decision will be made to prepare a statement for the entire Northern Great Plains region, but information available may indicate that statements on smaller subregions, geologic structures, basins or selected individual actions will fulfill the policy and procedural requirements of the National Environmental Policy Act in a more satisfactory manner. Until those decisions are reached no new coal leases will be issued except pursuant to the short-term leasing policy. The interim report from the NGPRP * * * will provide an information foundation for decision-making and planning."

Affidavit of Secretary Morton, App. 194–195. We agree that the NGPRP will provide a basis for making the decision whether to prepare a comprehensive impact statement for the Northern Great Plains. We only order that the Secretary, guided by our interpretation of the procedural and policy requirements of NEPA, make that decision.

report, in detail, what the federal role in the Region will be. *See* Arizona Public Service Co. v. FPC, *supra*, 157 U.S. App. D.C. at 280, 483 F. 2d at 1282. Appellants will be able to challenge appellees' impact statement decision and, if appellees decide not to prepare a comprehensive statement, to present again to the District Court their theory that the geographic, environmental, and/or programmatic interrelationship of activity in the Region mandates such a statement.

V

Since we refer back to appellees the decision whether to prepare a comprehensive impact statement for the Northern Great Plains, we continue our temporary injunction of January 3, 1975 until that decision is reached. This will preserve, in large part, the *status quo* pending appellees' decision. While we do not order issuance of any more comprehensive injunction at this time, we note that our decision to refer the issue of a regional EIS to appellees for resolution in the first instance is prompted in large part by appellees' forbearance in authorizing activity in the Region pending issuance of the NGPRP. In this regard, we have two observations. First, while Interior's interim policy seems to have been embarked upon with considerable good faith, we would have more confidence in it if the escape hatch were not quite so large. As matters stand, requests for approval of any activity within Interior's jurisdiction in the Northern Great Plains

> will be held in abeyance pending the availability and analysis of the interim report from the NGPRP study *or submitted to the Under Secretary for review and concurrence prior to execution.*

Affidavit of Secretary Morton, App. 194 (emphasis added). No standards at all are suggested by which

the Under Secretary will grant his concurrence. We think it would be appropriate, particularly if this policy were to continue following a decision to prepare a comprehensive impact statement, for the Secretary to determine and publish standards by which this significant exception will operate. Moreover, the remaining federal appellees' policy of forbearance seems to have dissolved, although they have actually approved few actions in the Region. *See* slip op. at 734–735 *supra*, —— U.S. App. D.C. at ——, —— F. 2d at ——. We think it would be appropriate for these appellees to adopt a policy similar to Interior's.

Second, as we noted in denying appellants' motion for a preliminary injunction last spring, the spectre of significant, and unnecessary, harm to large tracts of valuable wilderness still remains. The number of applications for federal approval of various activities is large. We urge appellees, while deciding whether to prepare a comprehensive impact statement for the Northern Great Plains, to take no actions that would defeat the purpose the impact statement is designed to serve. Needless to say, however, the courts remain open, to appellants or others, should the federal appellees decide nonetheless to approve any private endeavors in the Northern Great Plains.

Whether an injunction against activity, either ongoing or proposed, in the Northern Great Plains should issue pending preparation of a comprehensive regional impact statement is a question we need not reach.[41] We note only that a responsible policy of

[41] The District Court concluded that even if a regional impact statement were required appellants had shown no irreparable harm that would justify an injunction barring activity in the region until the statement were completed. Concl. 11, App. 248. In this regard, we direct the court's attention to this court's recent decision in Jones v. District of Columbia Redevelopment

restraint by the federal appellees with respect to authorizing such activity might make the question moot.

VI

This case has presented difficult questions involving the proper balance between an agency's discretion in deciding whether, and when, to issue an environmental impact statement, and the judiciary's role in overseeing exercise of that discretion. We believe that, to the fullest extent possible, it is for the agency to implement the demands of NEPA. While the courts should not shirk their role, it is the responsible compliance of the federal agencies that will make environmental planning a day-to-day occurrence and that will make the needless abuse of our priceless national heritage a nightmare of the past. We are confident the agencies will not lose, or misuse, this opportunity.

Reversed and remanded.

MacKinnon, Circuit Judge (dissenting):

In the foregoing opinion, the majority has remanded this case with instructions that it be held in abeyance pending the issuance of a "study" presently being prepared by the Federal appellees. It is anticipated that the release of the study will enable the various agencies involved to decide within 30 days thereafter whether "a comprehensive, programmatic impact statement for the Region" [1] is necessary. Since I conclude that a regional environmental impact statement (EIS) is not presently required in these circum-

Agency, 162 U.S. App. D.C. 366, 376, 499 F. 2d 502, 512 (1974), which makes clear that the harm to be considered in issuing an injunction in NEPA cases matures at the time an impact statement becomes necessary but is not filed.

[1] Majority Op. at 755, —— U.S. App. D.C. at ——, —— F. 2d at ——.

stances, I find no need to remand the case for further proceedings and accordingly dissent from the action of the majority.

The only immediate practical effects of the majority's decision is to continue the temporary injunction as ordered by this court on January 3, 1975, in order to "preserve * * * the *status quo.*" [2] My objections to the continuance of this injunction are the same as were indicated in my dissent to the original order. See Sierra Club v. Morton, 167 U.S. App. D.C. ——, 509 F. 2d 533, 534–36 (1975).

I

The trial court concluded that appellants' complaint failed to present a justifiable case of controversy because

> the courts will not review the validity of supporting statements or studies until final federal actions [are] taken under NEPA section 102 (2) and until after final agency action has been taken with respect to the individual project.[3]

While the majority concedes that "as a general proposition of law NEPA challenges to individual projects can be brought only after final agency approval of a

[2] *Id.*

[3] Conclusions of Law, ¶ 7, App. 247, *citing* Scientists' Institute for Pub. Info. v. AEC, 156 U.S. App. D.C. 395, 481 F. 2d 1079, 1091 (1973); Natural Resources Defense Council v. Morton, 148 U.S. App. D.C. 5, 458 F. 2d 827, 836 (1972); Coalition for Safe Nuclear Power v. AEC, 150 U.S. App. D.C. 118, 463 F. 2d 954, 955 (1972); Thermal Ecology Must Be Preserved v. AEC, 139 U.S. App. D.C. 366, 433 F. 2d 524, 526 (1970); Gage v. Commonwealth Edison Co., 356 F. Supp. 80, 86 (N.D. Ill. 1972); Sherry v. Algonquin Gas, 4 ERC 1713, 1714 (D. Mass. 1972).

project," it interprets Scientists' Institute for Public Information, Inc. v. AEC (SIPI), 156 U.S. App. D.C. 395, 481 F. 2d 1079 (1973), as holding that a challenge to a comprehensive program need not be made through an attack on an individual project.[4] As indicated hereafter, the record in this case does not establish the existence of any comprehensive *regional* program of the type found in *SIPI* which could justify requiring the preparation of a regional environmental impact statement at this time. However, even if one concedes that such a statement might be appropriate, the District Court was still correct in concluding that an action divorced from the review of a statement covering an individual project is not a proper means for the determination of appellants' claims.

In deciding that the instant case is a proper vehicle for raising a claim for a regional EIS, the majority has overlooked the required relationship between the statements prepared on individual projects and the "regional" statement appellants seek. If appellants are correct in asserting that NEPA requires the preparation of a regional EIS before any development of the Northern Great Plains may proceed, then all the statements covering individual projects necessarily must be at present insufficient to comply with NEPA. Conversely, if an EIS on an individual project is found to comply with NEPA, it necessarily follows that NEPA does not require the preparation of a more comprehensive statement before that project may proceed.

Impact statements have already been issued for the Westmoreland mine, the Peabody Coal Company project, and four mines and a railroad right-of-way in the

[4] Majority Op. at n. 20.

Eastern Powder River Basin. See Supp. Finding on Remand, ¶ 9a. Of these, the Westmoreland EIS was found to be sufficient under NEPA in Redding v. Morton, Civ. No. 74 12–BLG (D. Mont., May 1, 1974), appeal pending, 9th Cir. No. 74 1984, and the remaining statements apparently have not yet been challenged in court.[5] My dissent to the issuance of the temporary injunction states, and I continue to believe, that the proper method to use in assessing the need for a regional statement is for appellants to file an appeal challenging the sufficiency of the EIS covering an individual project.[6] Appellants' apparent inability to successfully challenge the statements on individual projects as too limited in scope is strong, if not compelling, evidence that a "comprehensive regional EIS" is not required at this time.

II

The starting point for any discussion of the need for an environmental impact statement is of course sec-

[5] Appellants' argument that it would be "inconvenient" for them to attack specific federal actions does not merit serious consideration by this court.

[6] The majority asserts: "There has been no contention that any of these individual statements comprehensively study the regional impact of coal development in the Northern Great Plains, and our examination of the statements makes it clear that they do not do so."
Majority Op. at n. 15. However, the real question in this case is whether such a comprehensive study is necessary here. As here indicated, this is merely another form of the inquiry into the sufficiency of statements on individual projects. Since the sufficiency of the individual statements was not litigated before the District Court, if the majority intended this statement as a finding based on its own examination that they are insufficient to support the projects they cover, it would be exceeding the permissible scope of appellate review.

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tion 102(2)(C) of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C):

> (2) all agencies of the Federal Government shall—
>
> * * * * *
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

The crucial question here is whether the Federal appellees have "proposed" "major federal actions" which require the preparation of an EIS covering all coal-related development in the "Northern Great Plains Region."[7]

[7] Appellants' complaint described the area in issue as "northeastern Wyoming, eastern Montana, western North Dakota and western South Dakota." App. 2. By a stroke of luck, this vague "region" roughly conformed with the 63 county area which the Northern Great Plains Resources Program (NGPRP) study later identified as the area in which development was likely to occur. However, the conclusion that a region has potential for developments is a far cry from a declaration that the federal government is undertaking a program of coordinated development of the region. The District Court correctly concluded: "The 'Northern Great Plains region' as described by the plaintiffs is not an entity, region, or area which has been defined by the Federal Government by statute or executive action for purposes of any Federal program, project, or action." Finding of Fact, 7, App. 235. Permitting appellants to define their own region for purposes of this action raises the clear possibility that other potential plaintiffs could seek an infinite progression of "regional" statements covering "regions" of their own choice, thus seriously disrupting any attempt by the federal appellees to deal with the development of a critical national resource. The majority recognizes the danger posed by its decision to allow appellants to maintain this action (Majority Op. at 745–747, —— U.S.App.D.C. at ——, —— F.2d at ——, ——) but declines to give the District Court any guidance on whether it must allow new plaintiffs to maintain suits seeking to compel, for example, the preparation of statements covering all coal deposits in the nation or covering a single Basin in the Northern Great Plains Province, both of which "regions" have also been the subject of various studies. This entire problem could be avoided simply by requiring appellants to challenge a particular federal action, thus enabling the court to evaluate the extent of the environmental impact from that action and define the region accordingly.

To place this case in perspective, it is important to keep in mind exactly what is not at issue. The federal appellees do not deny that they are taking actions related to coal development within this region. On the contrary, several projects are admitted to be in various stages of development, and the agencies have consistently prepared impact statements prior to taking action.[8] Nor is there any contention that the projects which have been approved or which may be approved in the future are not "major." Furthermore, the agencies have consistently required that the EIS on each project consider the cumulative environmental impacts of related developments.[9] Where appropriate,

[8] *See, e. g.*, the impact statements prepared for the Westmoreland Resources and Peabody Coal Company mines.

[9] The Preface to the Final Environmental Impact Statement on the Eastern Powder River Coal Basin, Vol. I, illustrates

they have prepared impact statements which consider together several related developments within an area.[10]

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the considerations used by the federal appellees in determining the necessary scope of an EIS: "Further, to meet the intent of the Act in the most productive fashion, it is necessary to examine the general geographic area of the proposed and potential actions. The geographic area for basic consideration is that part of the Powder River Coal Basin in Wyoming lying generally eastward from the Powder River to the outcrop line of the coal resource and from somewhat north of Gillette to a point somewhat south of Douglas. The area delineation is based in part on present and anticipated levels of mining activity, differing quality of the coal resource, different physical arrangement of the coal beds, somewhat different mining techniques required and differing physical reclamation requirements. These considerations having a broader scope of geographic impact such as social conditions, economic factors, atmospheric influence, water resources, and recreation uses are treated on a larger regional basis than the primary study area. This statement discusses the existing environment, evaluates the collective impact of the proposed actions and, insofar as now possible, the impacts of potential future coal mining within the geographic area described above. This statement also examines in detail certain proposed activities for which federal actions are required."

[10] *See, e. g.*, the Final Environmental Impact Statement for the Eastern Powder River Coal Basin, which covers four mines and an associated rail right-of-way. More recently, Interior has released a draft EIS for the Belle Ayr South Mine of the Amax Coal Company, also located in the Eastern Powder River Basin. The Preface to that document states:

"In January 1974, the Departments of Interior and Agriculture and the Interstate Commerce Commission decided that, under provisions of Section 102 of the National Environmental Policy Act of 1969, an environmental impact statement must be prepared before any decision could be made on pending proposals for major development of federally-owned coal in the Eastern Powder River Basin of Wyoming. At that time, there were four major strip mine plans pending approval before the Department of the Interior. There was also pending before

"Part I of that final environmental impact statement (hereinafter designated FES 74–55) was devoted to a regional analysis encompassing the existing environment, all projected coal development and the cumulative effect of this development on the environment. Parts II through VI of the FES specifically dealt with the four mine plans and the construction of the railroad.

"Due to the increased nationwide demand for low sulphur coal for the generation of electricity, it was anticipated that a number of large strip coal mines, in addition to those four mines considered in Parts III through VI of FES 74–55, would also be proposed for development of Federal coal leases in the near future in the Eastern Powder River Coal Basin. Accordingly, the regional analysis of FES 74–55 included data and information from every proposed operation known to be under consideration by the various leaseholders in the study area. In this way the cumulative impacts of the total potential development could be assessed. Subsequent to initiation of preparatory efforts for FES 74–55 and prior to its filing in final form, other proposed mining and reclamation plans for development of existing Federal coal leases in the

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the Interstate Commerce Commission proposed construction of a railroad some 113 miles in length, between the Belle Ayr Mine spur southeast of Gillette, Wyoming, and Douglas, Wyoming. This railroad was to serve the coal mines proposed to be developed along the proposed right-of-way in the basin. The construction of this railroad line, the four mining proposals, as well as a number of other anticipated or possible future coal-related developments and all their impacts on the environment, were evaluated in an environmental impact statement entitled "Proposed Development of Coal Resources in the Eastern Powder River Basin of Wyoming." The final statement was filed with the Council on Environmental Quality by the Department of the Interior on October 18, 1974.

area were filed for approval with the Geological Survey, Department of the Interior, as required by law.

"Because of the submission date, these plans could not be included for site specific analyses in FES 74–55. In the assessment which follows, the site specific aspects of the proposed mining and reclamation plans for the South Belle Ayr Mine of the Amax Coal Company, are analyzed using information and data previously published in FES 74–55 together with information gained from field observations and company reports. Part I of FES 74–55 is incorporated herein by reference."

What appellants present to this court is a claim that all these good faith efforts on the part of the various agencies are not sufficient to satisfy the demands of section 102(2)(C). To carry out the alleged requirements of NEPA, appellants assert that before any development in the region may be allowed to go forward, the agencies concerned must first prepare a "comprehensive" analysis of the environmental impacts of all present and potential development within the region.

III

By reversing the decision of the District Court, the majority is indicating its belief that there is some substantial possibility that appellant's claims will ultimately be successful. To reach this conclusion, the opinion reasons that major federal action can be combined to create a new major federal action for which an EIS is necessary. Its authority for this proposition is this court's decision in Scientists' Institute for Public Information, Inc. v. AEC (SIPI), 156 U.S. App. D.C. 395, 481 F. 2d 1079 (1973) and the Second Circuit decision in Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation, 508 F. 2d 927 (2d Cir. 1974). There is no doubt *SIPI* holds that

a comprehensive statement may be required *in certain circumstances* but like any holding it is colored by its facts and its reasoning. The difficulty arises in the application of that decision to the facts here.

The crucial consideration which justified the requirement of a statement covering more than an individual project in both *SIPI* and *Conservation Society* was the presence of irretrievable commitments of resources beyond what was actually expended in an individual project. In *SIPI,* each development in the Liquid Metal Fast Breeder Reactor Program made it more unlikely that the agency could in the future abandon its investment in favor of some alternate energy source:

> The manner in which we divide our limited research and development dollars today among various promising technologies in effect determines which technologies will be available, and what type and amount of environmental effects will have to be endured, in the future when we must apply some new technology to meet projected energy demand.

481 F. 2d at 1090. Similarly, the court found in *Conservation Society* that the construction of a 20-mile segment of highway would generate traffic and thus create pressure for further construction along the entire route and foreclose consideration of alternatives to highways.

Phrasing these decisions in terms of the potential "regional" development at issue in the instant case, it is clear that the courts in *SIPI* and *Conservation Society* found that a federal action at one point in the "region" would cause a ripple effect which would eventually have an impact on future federal actions elsewhere in the "region." Because of this effect, each court determined that the agency involved was required to prepare a comprehensive statement for the

entire "region" before it could approve an individual project within the "region".

The reason for the above holdings becomes clear when one considers the purpose underlying the preparation of impact statements. Virtually every federal action "significantly affecting the quality of the human environment" will necessarily involve some irreversible and irretrievable commitment of resources. NEPA only requires that the agency disclose these environmental costs and consider them in arriving at a decision; it does not prevent an agency from proceeding with a project if the benefits outweigh the costs disclosed in the EIS. Thus where the only irretrievable commitments of resources are those directly associated with an individual project, an impact statement covering that project is sufficient to enable the agency to act. However, in situations where the decision on one federal project was found to presently cause irretrievable commitments on future projects or the foreclosure of future options, this court and the Second Circuit quite properly found that an EIS for the entire project was necessary before the initial step could be taken.[11]

[11] The Ninth Circuit recently arrived at a similar interpretation of *SIPI:* "Nor is Scientists' Institute for Public Information v. Atomic Energy Comm'n, 156 U.S.App.D.C. 395, 481 F. 2d 1079 (1973) particularly pertinent here. There an EIS was required for continued research and development on the AEC's Liquified Metal Fast Breeder Reactor (LMFBR) Program covering foreseeable environmental effects if such a reactor were put into future use. The LMFBR has no independent significance absent such future uses. The court was careful to emphasize that its decision to require an EIS was based in large part upon the significance of the overall reactor program as a radical change in the manner in which the entire nation produces electricity. See 481 F. 2d at 1089." Trout Unlimited v. Morton, 509 F. 2d 1276, 1285 n. 13 (9th Cir. 1974).

Applying the above analysis, the instant case is readily distinguishable from both *SIPI* and *Conservation Society.* Any coal-related federal action will undoubtedly require certain associated developments. For example, the approval of a mining plan will most probably require the granting of rail rights-of-way and the construction of housing facilities for mine employees. However, these are direct consequences of the initial action, and the agencies involved have always taken the position that such impacts must be considered in the EIS which precedes approval of the mining plan. This record is devoid of the type of commitment of "regional" resources which justified the results in *SIPI* and *Conservation Society.* Developments in one part of the Northern Great Plains are essentially independent from developments elsewhere in the region. For example, the decision to permit mining of sub-bituminous coal in Wyoming to which the Federal Government has the mineral rights, in no way commits Interior to approving proposals for mining lignite, similarly owned by the United States, in North Dakota. Even within each of the Basins which comprise the Region, development of some portion of the coal reserves does not irretrievably commit the federal agencies to permit development of the entire reserve. Furthermore, it is clear that even the largest of the proposed projects will not have an environmental impact on the entire Northern Great Plains Region. It may indeed be the case that widespread development of this area will eventually occur, but the impetus for that development will come from the nation's need for

coal and not from the fact that partial development of the region has been allowed.[12]

IV

If *SIPI* and *Conservation Society* were the only relevant decisions, the majority's arguments might have some appearance of validity. However, several courts have considered arguments such as those advanced by appellants, in cases which presented facts that were considerably closer to the instant case than *SIPI* and *Conservation Society,* and have determined that a "regional" EIS was unnecessary before individual projects within the "region" could be approved. *See* Trout Unlimited v. Morton, 509 F. 2d 1276 (9th

[12] The Majority Opinion at n. 28 cites two "examples" of how it contends the various present and potential developments are interrelated—the availability of water supplies and manpower resources in the region. Actually, the use of the term "manpower" is a misnomer since what the majority is really talking about is the pressure of the influx of necessary additional manpower on the area. Insofar as one mine creates pressure for a population influx, that is just one more factor to be considered in the EIS for that particular project. However, the opening of that mine in no way commits the agencies to authorizing other mines which would require the importation of additional manpower not already in the area at a future date. With respect to water resources, there is no showing here that the strip mines, which presently are the only projects actively being developed, have sufficient impact on regional water resources to foreclose future alternatives. The proper time to consider such problems will be when the agencies move to a proposed type of development which does tax regional resources. If there is insufficient water for a particular type operation, then that type operation would not be used. In any event, this entire discussion points up the importance of appellants' failure to show at any point in this record that the EIS on any particular project has failed to adequately consider all relevant environmental impacts.

Cir. 1974); Sierra Club v. Stamm, 507 F. 2d 788 (10th Cir. 1974); Sierra Club v. Callaway, 499 F. 2d 982 (5th Cir. 1974); Environmental Defense Fund v. Armstrong, 356 F. Supp. 131 (N.D. Cal.), aff'd, 487 F. 2d 814 (9th Cir. 1973); Jicarilla Apache Tribe of Indians v. Morton, 471 F. 2d 1275 (9th Cir. 1973); Movement Against Destruction v. Volpe, 361 F. Supp. 1360 (D. Md. 1973).

In its attempt to evade the clear holdings of these cases, the majority dismissed them with the assertion that:

> Every cited case involved the propriety of an injunction against an individual project pending completion of a regional EIS or other study. None of the cases involved a direct challenge to the need for a regional EIS.

Majority Op. at n. 29. This is a classic example of a distinction without a difference. Surely, it is not reasonable to suggest that the decisions reached by other courts are somehow less sound because they were able to assess the need for a regional EIS in the context of a challenge to the sufficiency of a specific statement whereas this court is considering a challenge in the abstract without ever determining that a particular EIS does not comply with the dictates of NEPA. If any inference can be drawn from the majority's distinction, it would be that the cited cases are entitled to considerably more weight than this court's decision in the instant case.

In *Jicarilla, supra,* the court rejected contentions that impact statements issued in connection with each of several coal-fired electric generating projects in four southwestern states violated NEPA because they were issued prior to the completion of a Southwest Energy Study by the Interior Department. The ma-

jority is correct in pointing out that the plaintiffs in *Jicarilla* were specifically seeking delay pending the completion of a "study" rather than delay pending the preparation of a regional EIS, but rather than forming the basis of a distinction, this fact emphasizes its similarity to the instant case. The Southwest Energy Study "was designed to evaluate the problems created by further development of coal-fired electric power in the Southwest;" (471 F.2d at 1279), a purpose quite similar to that of the Northern Great Plains Resources Program study. The Majority opinion at this point apparently overlooks the fact that its opinion ultimately does *not* direct the preparation of a regional EIS for the Northern Great Plains but rather just arrests development within the region until the study issues, at which point the need for a regional EIS would be assessed. The Ninth Circuit found that this sort of delay was not mandated by NEPA, and my conclusion on the facts of this case is to the same effect.

In Environmental Defense Fund v. Armstrong, *supra,* the Ninth Circuit affirmed a District Court decision rejecting an argument that an EIS covering the New Melones Dam project was inadequate because it did not include a "comprehensive study" covering the entire California Central Valley Project. Although the plaintiffs once again requested only a study and not a regional EIS, the language of the District Court is instructive:

> Under these circumstances there is no requirement under NEPA that the EIS with respect to the New Melones Project be delayed until a comprehensive study of the Central Valley Project be completed. So long as each major federal action is undertaken individually and not as an indivisible, integral part of an integrated state-wide system, then the requirements of NEPA are determined on an individual major federal action basis. Plaintiffs' suggestion that there is need for a comprehensive study of the Central Valley Project should be made to the Congress, and not to the Court.

356 F.Supp. at 139. As is stated above, the federal actions related to coal development in the Northern Great Plains fall largely into this same category. The majority notes that the court in *Armstrong* refused to wait for the study because no comprehensive study had been commenced, and therefore finds the case to be in sharp contrast to the instant case where the NGPRP Study is under way. It is revealing, however, that the majority does *not* find this fact to be of significance in its discussion of *Jicarilla* where the Southwest Energy Study had been released by the time the case was decided.

The remaining cases cited on slip op. at 763, 764, *supra,*—— U.S.App.D.C. at ——, —— F.2d at ——, involved demands that a comprehensive EIS be prepared prior to the approval of individual projects and thus are squarely on point with the instant case. In Sierra Club v. Callaway, *supra,* the Fifth Circuit reversed a District Court decision which had ordered that construction of the Wallisville Reservoir project be held up pending the preparation of an EIS covering the entire Trinity Basin project. The court held:

> We conclude that the Wallisville and Trinity River Projects are not interdependent. The nexus between the projects is not such as to require an EIS evaluation of the Trinity Project as a condition precedent to an EIS evaluation of Wallisville. The Wallisville EIS should speak for itself. Wallisville is a separate viable entity. It should be examined on its own

> merits. Although it has been made compatible in certain of its features with Trinity it is not a mere component, increment, or first segment of Trinity. The court erred in so holding.

499 F. 2d at 990. Faced with a similar situation, the Tenth Circuit reached the same conclusion in Sierra Club v. Stamm, *supra*. There the plaintiffs attacked the final EIS for the Strawberry Aqueduct and Collection System, a subunit of the larger Bonneville Unit which was in turn a part of the Central Utah Project, because *inter alia*:

> (1) The Statement is too narrow in its scope and should include the cumulative and collective environmental impact of the entire Central Utah Project; (2) the Statement is incomplete in that it is a *final* statement as to the Strawberry Collection System only, and that it should, but does not, encompass all increments of the Bonneville Unit;

507 F. 2d at 790. Relying on *Callaway* and *Armstrong*, the court concluded:

> In sum, then, we agree with the trial court that the Strawberry system in and of itself constitutes a "major Federal action" and that it is not a mere increment of either the Bonneville Unit or the Central Utah Project requiring a final impact statement for something more than the Strawberry system before work may be commenced on the Currant Creek Dam.

507 F. 2d at 792 93. Thus both the Tenth and Fifth Circuits decided cases against the Sierra Club on the same grounds that they assert here.

In its most recent decision on this subject, the Ninth Circuit once again rejected claims that an EIS of larger scope was required by NEPA. The Teton Dam and Reservoir project had been divided into two

phases. In Trout Unlimited v. Morton, *supra,* the plaintiffs argued that the EIS prepared for the initial phase was fatally inadequate because it did not discuss the environmental impact of the Second Phase. After considering the cases relied upon by the majority here,[13] the court concluded:

> The distinction between those situations in which it has been held that the EIS must cover subsequent phases and that before us is that here the First Phase is substantially independent of the Second while in those in which the EIS must extend beyond the current project, that project was dependent on subsequent phases. The dependency is such that it would be irrational, or at least unwise, to undertake the first phase if subsequent phases were not also undertaken. This is not the case here.

509 F. 2d at 1285 (footnote omitted).

The majority attempts to evade the fact that its decision is contrary to the clear weight of authority elsewhere in the federal courts of the nation by arguing that each of the foregoing decisions involved a "crucial dependence upon the facts."[14] Obviously all judicial decisions turn on the facts which are presented to the court, but the majority has failed to offer any convincing explanation as to why the facts of the instant case, which present the same situations as the facts in the cases cited above, require a different result.

The regional water projects involved in *Callaway, Stamm* and *Trout Unlimited* had certainly progressed

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[13] The court discussed *SIPI* and Thompson v. Fugate, 347 F. Supp. 120 (D. Conn. 1972) and Indian Lookout Alliance v. Volpe, 345 F. Supp. 1167 (S.D. Iowa 1972), modified, 484 F. 2d 11 (8th Cir. 1973). The latter two cases involved attacks on impact statements covering segments of highway and thus presented issues similar to *Conservation Society*.

[14] Majority Op. at n. 29.

to the point where the federal agencies involved had concrete notions as to the ultimate scope of regional development, yet the court in each case found it unnecessary to prepare a regional EIS before acting on the initial phases of the development. In contrast, even if we ignore the statements by the federal appellees that there is at present no overall coordinated program for the development of coal resources in the Northern Great Plains, appellants have failed to establish that planning has progressed to the point where some proposal for major *regional* federal action exists which could be the subject of a regional EIS.

Furthermore, although there are undoubtedly some interrelationships between development projects along the course of a single river or in a single watershed basin, the Fifth, Ninth and Tenth Circuits were still able to find the projects sufficiently independent to render a more comprehensive EIS unnecessary. The potential development of the Northern Great Plains lacks even this slight relationship between projects. Appellants, at a time of great need for new energy sources, are seeking to halt development of three grades of coal deposits distributed through four states and involving nine federal agencies and at least fifteen different forms of "federal action." Clearly the developments projected for this Region by appellants themselves do not have even the minimal interrelationships one might have expected to find in *Callaway, Stamm* or *Trout Unlimited.*

V

The majority is to be credited for perceiving the "practical difficulties" inherent in appellants' contention that NEPA allows the courts to impose upon the

Government the duty to plan comprehensively.[15] Truly, such an interpretation could result in the generation of an infinite progression of comprehensive plans which would have to be justified by comprehensive impact statements. It seems obvious that NEPA was enacted as a means of facilitating agency decision making and not as a means of paralyzing the federal government. However, I am concerned that rather than nipping such fallacious notions in the bud, the majority attempts to demonstrate that appellants' arguments have a legal basis.[16] Although its dicta is constructed on prior dicta and on CEQ Guidelines of questionable force as legal authority, it has laid the groundwork for the perpetuation of this erroneous and impractical position in future cases.

From its review of the record, the majority finds "overwhelming" evidence that "the federal appellees have for years been endeavoring to develop a plan for regional development of the coal resources in the Northern Great Plains." [17] However, the most remarkable thing about the first two such "endeavors" was the fact that they collapsed without producing any plan for regional development. The only currently pending activity which could lead to the "regional plan" anticipated by the majority is the Northern Great Plains Resources Program Study, but there is no assurance at present that it will be any more successful than the earlier studies. Furthermore, the Study was *never intended* to produce a comprehensive

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[15] Majority Op. at 746–747, —— U.S. App. D.C. at ——, —— F. 2d at ——.

[16] *Id.* at 745–747, —— U.S. App. D.C. at ——, —— F. 2d at ——.

[17] *Id.* at 748, —— U.S. App. D.C. at ——, —— F. 2d at ——.

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regional plan for coal development. The Draft Interim Report states:

> The primary objective of the Northern Great Plains Resource Program is to provide information and a comprehensive analysis that can be used to place the potential impacts of coal development into perspective and thereby assist the people of the Northern Great plains and the Nation in the management of the natural and human resources of this region.
>
> * * * * *
>
> *The three coal development profiles do not represent plans for development,* but are instead tools designed to help measure what the effects may be at different rates of development.

Northern Great Plains Resource Program, Draft Report, Sept. 1974, I–4, 5 (emphasis in original). Not only is the Study insufficient to be viewed as a regional EIS, as the majority correctly notes,[18] its issuance will probably add little to this court's ability to determine the need for a regional EIS if on remand the federal appellees adhere to their position that they have not yet adopted or proposed a regional development program.

Since review of the record and consideration of those cases which have dealt with claims for the preparation of more "comprehensive" impact statements lead me to agree with the District Court [19] that NEPA does not require the preparation of an EIS covering all coal-related development in the entire Northern Great Plains at this time, there is no need to remand this case for further proceedings. Nor is there any justification in further delaying projects which are already supported by impact statements through continuation of this court's temporary injunction.

[18] *Id.* at 749–750, —— U.S. App. D.C. at ——, —— F. 2d at ——.

[19] *See* Conclusions of Law, ¶ 6, App. 247.

If appellants believe at some point that an EIS issued in support of federal action on a particular project fails to adequately consider all reasonably related environmental impacts, they can challenge that project under the normal procedure for judicial review of impact statements. Furthermore, in the event the various agencies take concrete steps toward the establishment of a federally coordinated program of regional development, appellants will of course be able to bring their suit if the agencies take a "major federal action" to implement that program without the preparation of the necessary impact statements.[20]

While the majority's attempt to force the federal government to engage in comprehensive long-range planning might in some sense be socially "good," the question before this court is not what the agencies "ought to" do but rather what NEPA requires that they do. To my mind it clearly does not require or authorize the continuance of the temporary injunction to hold federal agencies in check because the majority are suspicious of what the federal agencies might do. I accordingly respectfully dissent.

[20] The majority's suggestion that the agencies might be required to prepare an impact statement or a statement of reasons to justify why they are *not* taking major federal action to control development of the Northern Great Plains (Majority Op. at 755, —— U.S. App. D.C. at ——, —— F. 2d at —— and n. 37) is clearly not consistent with the provisions of NEPA. Despite the current size of the federal bureaucracy, the realm of things the federal government does *not* do is still rather large. A good many of these inactions undoubtedly have an impact on the environment, but it is difficult to see how any agency would be able to produce this nearly infinite number of "negative" impact statements and still carry out its assigned functions. In any event, NEPA clearly limits the requirement for preparation of impact statements to "proposals for . . . major federal *actions.*"

APPENDIX B

SIERRA CLUB ET AL., APPELLANTS,

v.

ROGERS C. B. MORTON, SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.

(No. 74–1389)

United States Court of Appeals, District of Columbia Circuit.

(Argued Dec. 17, 1974; Decided Jan. 3, 1975)

Before BAZELON, Chief Judge, and WRIGHT and MacKINNON, Circuit Judges.

ORDER

PER CURIAM.

On consideration of appellants' motion for a limited injunction pending appeal, and it appearing from the Secretary's answer to Plaintiffs' Revised Supplemental Interrogatory No. 31 that the Secretary is in the process of approving or disapproving the mining plans and railroad rights-of-way set forth in the Eastern Powder River Coal Basin Environmental Impact Statement and that such an injunction is required to maintain the status quo pending disposition of this appeal, it is

Ordered by this court that the aforesaid motion is granted, and it is

Further ordered by this court that the Secretary of the Interior take no action concerning the mining plans and railroad rights-of-way set forth in the Eastern Powder River Coal Basin Environmental Impact Statement pending further order of this court.

MacKinnon, Circuit Judge (dissenting):

In the foregoing order the majority grant appellants' motion for a limited injunction pending appeal and order the Secretary of the Interior to refrain from any action concerning the projects covered by the Eastern Powder River Coal Basin Environmental Impact Statement until further order by this court.

Although the Powder River Statement is attached to the record as an exhibit, the court below was not called upon to rule as to the adequacy of the statement to support the particular federal actions it covers, and therefore that issue is not before this court on appeal. If appellants believe that that particular statement is not sufficient to justify approval of the mining plans and rights-of-way, the proper method for the expression of such concerns is to file an appeal challenging that statement. All of appellants' arguments relating to the necessary scope of impact statements on projects within the region can be raised in a challenge to a particular statement. The appeal presently before this court is not an appropriate vehicle for obtaining *de facto* review in this circuit of the sufficiency of impact statements covering various federal projects within appellants' "Northern Great Plains Region." It obviously is less convenient for appellants to be required to litigate each statement, but the law was not written for the convenience of the Sierra Club and other litigants.

The Powder River Statement is only one of three statements which have been issued on projects within

the region. See Supplemental Finding on Remand No. 9a. The adequacy of the statement relating to the Westmoreland mine has been litigated following approval of that application. The Montana District Court held in Redding v. Morton, Civ. No. 74–12–BLG (D.Mont. May 1, 1974) that that statement complies with the requirements of NEPA, and that case is on appeal to the Ninth Circuit. This court obviously cannot enjoin the Ninth Circuit from upholding the Montana District Court and thus allowing the development to proceed. Nor could it enjoin the parties from proceeding with a project approved by another court. The Peabody Coal Company project has also been approved but apparently it has not yet been challenged in court (Supp. Memo of Intervening Defendants-Appellees at 12). If an action is initiated to review the adequacy of the statement covering that project, this court could not prevent another court from entertaining that action. The effect of the proposed injunction, then, is to remove one of the three impact statements from the normal process of judicial review of the adequacy of such statements.

In Scientists Institute for Public Information, Inc. (SIPI) v. AEC, 156 U.S. App. D.C. 395, 411 n.68, 481 F.2d 1079, 1095 n68 (1973), this court stated:

> The decision whether the time is ripe for a NEPA statement on an overall research and development program is a mixed question of law and fact. * * *
>
> With respect to judicial review of such mixed questions of law and fact, the Supreme Court has authorized a practical standard of review, the "rational basis" test, under which the court will reverse the agency's decision if it has no warrant in the record and no reasonable basis in law.

The agency decision in the instant case is that no federal program currently exists which requires the preparation of a comprehensive impact statement covering appellants' "Northern Great Plains Region." An agency decision as to the scope of an impact statement should receive at least as much deference as a decision on the timing of the preparation of a statement. Thus the Department of the Interior's decision not to issue a regional statement should also be upheld if it has a rational basis.

Rather than proceeding on a regional basis, the Secretary has decided to prepare a national policy governing coal leasing activities. The Government's position has consistently been that an impact statement must be prepared before any major federal action relating to coal development will be taken within the "region" or elsewhere. See Supp. Finding on Remand No. 6. Any statement will cover cumulative as well as incremental impacts. Where it finds that a statement covering related actions within an area is appropriate, a broader statement will be issued. The preface of the Powder River Statement, quoted in Supp. Finding on Remand No. 8, illustrates the considerations which determine the appropriate scope of such a statement. The Secretary has also initiated the Northern Great Plains Resources Program Study which by chance covers roughly the same area as the vague "region" described in appellants' complaint. However, this Study is merely intended to provide a framework for future decision-making and is not designed to produce an impact statement for particular federal actions. The court may feel that it would be beneficial for the Government to engage in the type of comprehensive long-range regional planning which appellants advocate, but it cannot be logically argued that the Government's approach to the problem is without a rational basis.

The instant case is distinguishable from *SIPI* which required the preparation of a comprehensive impact statement covering a research and development program for liquid metal fast breeder reactors. *SIPI* dealt with one program of research into a particular type of reactor being conducted by a single federal agency and funded by a separate annual appropriation. It was reasonable to view this program as a "major federal action" for which an overall impact statement would be appropriate. In contrast, appellants in the instant case seek to bring to a halt any federal action which may be related to the development of deposits of three grades of coal distributed through four states. Nine federal agencies and at least 15 types of federal action are involved. The record discloses no action directed to appellants' entire "region" except the Study. It is certainly not necessary for the Government to prepare an impact statement prior to studying a problem.

SIPI involved an irretrievable commitment of resources since each expenditure on the development of a particular style of breeder reactor made it more difficult to abandon the investment in favor of an alternate design. No such commitment of resources exists in the instant case. The fact that one mining operation is approved does not compel or impel the approval of other mining proposals elsewhere in the region. While some projects will undoubtedly be interrelated (*e.g.* a mine and associated rail rights-of-way), the impact statements on such projects will be coordinated and must consider cumulative effects. In general the development of any portion of the region can proceed independently of prior development elsewhere.

Absent proof of the existence of an explicit or implicit federal program covering the entire region and absent an irretrievable commitment of *regional* resources from the approval of *individual* federal actions, it cannot be said that the Government has abused its discretion by declining to prepare a regional impact statement. Thus the facts in *SIPI* are distinguishable from the situation here presented and that decision does not require that appellants' contentions be upheld by this court.

The Fifth, Ninth and Tenth Circuits have recently upheld impact statements covering individual projects which were alleged to be part of larger regional developments. Sierra Club v. Stamm, 507 F. 2d 788 (10th Cir. Nov. 29, 1974);[1] Sierra Club v. Callaway, 499 F. 2d 982 (5th Cir. 1974);[2] Environmental Defense Fund v. Armstrong, 487 F. 2d 814 (9th Cir. 1973), cert. denied, 416 U.S. 974, 94 S. Ct. 2002, 40 L. Ed. 2d 564 (1974).[3] The projects dealt with in those cases were more closely related and were confined to smaller geographic areas than are the proposed federal actions attacked by appellants in the instant case, and yet the circuit courts in each of those cases found that an impact statement for the affected region was not required.

For the foregoing reasons I respectfully dissent from the issuance of the subject injunction.

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[1] This involved the relation of the Strawberry Aqueduct & Collection System to the larger Bonneville Unit and Central Utah Projects.

[2] This involved the relation of the Wallisville Reservoir Project to the larger Trinity River Project.

[3] This involved the relation of the New Melones Dam to the larger Central Valley (California) Project.

APPENDIX C

United States Court of Appeals for the District of Columbia Circuit

[Civil Action 1182–73, Filed, October 14, 1974; Hugh E. Kline, Clerk]
(No. 74–1389)

SIERRA CLUB, ET AL., APPELLANTS

v.

ROGERS C. B. MORTON, SECRETARY OF THE UNITED STATES DEPARTMENT OF INTERIOR, ET AL.

Before: Circuit Judge LEVENTHAL and Judge NICHOLS, Court of Claims.

ORDER

It is hereby ordered, *sua sponte,* that argument be rescheduled for December 17, 1974.

In the interim, the record is remanded to the District Court for a further evidentiary hearing. The court would like to have the benefit of the district judge's findings on the following matters:

1. Is the limitation on the issuance by the United States of coal leases announced on February 17, 1973, still in effect? How many leases have been issued for lands in the Northern Great Plains region since February 17, 1973?

2. Is the suspension of the issuance by the United States of coal prospecting permits announced on Feb-

ruary 13, 1973, still in effect? How many, if any coal prospecting permits have been issued in the Northern Great Plains region since February 13, 1973?

3. To what extent has coal leasing on Indian lands in the Northern Great Plains region been approved by the Department of the Interior since February 17, 1973?

4. Have any applications for permits for rights-of way over lands within national forests in the Northern Great Plains region been considered or acted upon by the Department of Agriculture since June 30, 1974? Have any applications for permits for rights-of-way over navigable rivers in the Northern Great Plains region been considered or acted upon by the Corps of Engineers since June 30, 1974?

5. Has the Northern Great Plains Resources Program interim report been released? Is any further action contemplated regarding that program?

6. Does the United States Government contemplate the preparation of any future environmental impact statements—other than statements for individual projects—for the Northern Great Plains area, the Fort Union Formation, or for any subregion thereof?

7. What is the status of the granting of water rights and water contracts in the Northern Great Plains area?

8. How was the area to be covered by the EIS for the development of coal resources in the Eastern Powder River Coal Basin defined, and how was it determined that an EIS was appropriate for that area?

9. Regarding environmental impact statements for individual projects in the Northern Great Plains area, where the statements have been issued after Febru-

ary 17, 1973, or prepared for projects that were commenced after that time—

a. Provide one or more representative statements.

b. Do the statements attempt to provide an assessment of the cumulative impact of the governmental action in the surrounding area?

c. Do the statements take into account the ecological setting created by private action in the area?

d. Has the government devised any procedure for cross-referencing among the individual statements?

The December argument date allows the case to be argued several months earlier than if it had not been expedited, while permitting the court to obtain the benefit of the supplemental record and findings, which the court believes will facilitate its consideration of the issues. The court requests the District Court, which has latitude to revise its earlier findings and conclusions, to file the supplemental record, and findings on or before November 25, 1974.

Counsel for all parties—appellants and appellees may file supplemental memoranda, on or before December 9, 1974, concerning the significance of the supplemental record and findings, and the consequence in terms of the appropriate disposition by the Court of Appeals.

Per Curiam

For the Court:

HUGH E. KLINE,
Clerk.

APPENDIX D

United States District Court for the District of Columbia

[Filed February 14, 1974, James F. Davey, Clerk]

(Civil Action No. 1182–73)

SIERRA CLUB, ET AL., PLAINTIFFS

v.

ROGERS C. B. MORTON, ET AL., DEFENDANTS

and

PEABODY COAL CO., ET AL., INTERVENOR DEFENDANTS

MEMORANDUM OPINION

In this suit several environmental and public interest organizations sue the Secretaries of the Department of Interior, Department of Agriculture, Department of the Army and other Federal govenment officials claiming that they have violated the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* (NEPA). Plaintiffs seek a declaratory judgment, injunctive relief and mandamus and allege that the defendants in violation of NEPA mandates have permitted and authorized development of coal reserves in the Northern Great Plains region without first preparing a comprehensive environmental-impact statement, systematic interdisciplinary studies of coal-development and a study of appropriate alternative courses of action. Several coal mining companies, elec-

tric power and utility companies and the Crow Tribe of Indians were allowed to intervene.

The matter came on for hearing upon plaintiffs' motion for summary judgment, the cross motions for summary judgment of the Federal defendants and of the intervening defendants, the motion for judgment on the pleadings of the intervening defendants, and the motions for partial summary judgment of intervening defendants Atlantic Richfield Company, Kerr-McGee Corporation, and Westmoreland Resources. Upon consideration of these motions, the affidavits, exhibits, answers to interrogatories and memoranda filed by the parties, and the oral arguments of counsel, the Court hereby enters the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiffs are the Sierra Club, a nonprofit California corporation; the National Wildlife Federation, a nonprofit District of Columbia corporation; the Northern Plains Resource Council, a nonprofit unincorporated organization with members in Montana; the Montana League of Conservation Voters, an unincorporated organization with members in Montana; and the League of Women Voters of South Dakota, an unincorporated organization with principal offices in Rapid City, South Dakota. Many members of plaintiff organizations live, work, engage in recreational activities, own land and hold surface rights on or immediately adjacent to the sites of coal mining and related activities in the four-state area, Montana, Wyoming, North Dakota and South Dakota. These plaintiffs sue as organizations and on behalf of their members.

2. The defendants named in the complaint are Rogers C. B. Morton, the Secretary of the Interior;

Marvin Franklin, Assistant Secretary for Indian Affairs of the Department of the Interior; Gilbert G. Stamm, Commissioner of the Bureau of Reclamation of the Department of the Interior; Vincent E. McKelvey, Director of the United States Geological Survey of the Department of the Interior; Earl L. Butz, the Secretary of Agriculture; John R. McGuire, Chief of the Forest Service of the Department of Agriculture; Howard H. Callaway, the Secretary of the Army; and F. J. Clarke, Chief of Engineers, United States Army Corps of Engineers. Burton W. Silcock was also named as a defendant as Director of the Bureau of Land Management of the Department of the Interior but the United States has alleged that Curt Burkland is the Director of the Bureau of Land Management.

3. The following parties were allowed to intervene as defendants: Atlantic Richfield Company; Cities Service Gas Company; Westmoreland Resources; Peabody Coal Company; Kerr-McGee Corporation; American Electric Power System; Panhandle Eastern Pipe Line Company; Arkansas Power & Light Company; Oklahoma Gas & Electric Company; Northern Natural Gas Company; Wisconsin Power & Light Company; Patrick J. McDonough; The Crow Tribe of Indians; Montana Power Company; Puget Sound Power & Light Company; Portland General Electric Company; and the Washington Water Power Company.

4. By this suit plaintiffs seek a declaration that NEPA requires

> the preparation and consideration of a comprehensive environmental-impact statement concerning coal development in the Northern Great Plains region before issuing coal prospecting permits or mining leases, entering into options or contracts for the sale of water or taking any

> other actions concerning coal development in the Northern Great Plains Region. * * *;

and that NEPA also requires

> the carrying out of systematic interdisciplinary studies of the coal development in the Northern Great Plains region and the study of appropriate alternatives to this development.

5. Plaintiffs also seek an injunction against any actions by the Federal Government affecting coal development in the Northern Great Plains region pending the completion of an Environmental Impact Statement for that region and related studies under NEPA Sections 102(2) (A), (C), and (D).

6. The complaint asserts that the "Northern Great Plains region involved in this lawsuit includes northeastern Wyoming, eastern Montana, western North Dakota, and western South Dakota."

7. The "Northern Great Plains region" as described by the plaintiffs is not an entity, region, or area which has been defined by the Federal Government by statute or executive action for purposes of any Federal program, project, or action.

8. There is no existing or proposed Federal regional program, plan, project, or other regional "federal action" *within the meaning of NEPA Section 102(2)* for the development of coal or other resources in the area defined by the plaintiffs as the "Northern Great Plains region."

9. Pursuant to the authority of the Mineral Leasing Act of 1920, 41 Stat. 437, 30 U.S.C. 181 *et seq.* as amended, the Department of the Interior, beginning in 1920 issued coal mining leases on Federal lands in Montana covering 33,000 acres. Of those leases, five are presently producing, including the lease issued in 1923.

Beginning in 1922, that Department commenced issuing coal leases covering 16,000 acres of land in North Dakota. Six of those leases, including the lease issued in 1922, are still producing.

Commencing in 1922, the Department of the Interior has issued coal leases covering 118,000 acres of Federal lands in nothern Wyoming. Of those leases, only four are presently producing, including the lease issued in 1922.

10. Coal prospecting permits have also been issued for several thousand acres of Federal-owned lands in Montana and Wyoming and in addition, several thousand acres of land in the Crow, Cheyenne, Ft. Berthold, and Wind River Indian Reservations have been leased by the Tribes with the approval of the Bureau of Indian Affairs.

11. At the present time, coal is being produced from only *four* leases in Montana, *six* leases in North Dakota, and *four* leases in northern Wyoming. All producing coal mines are operating under approved mining plans and under state-approved reclamation plans.

12. On May 26, 1970, the Department of the Interior initiated the North Central Power Study. The purpose of that study was to investigate the potential for coordinated development of electric power supply in the north central United States. The Department of the Interior was aware that private companies have had plans or are developing plans for utilization of coal in the Northern Great Plains and many such development plans involve state or privately owned lands—not lands of the United States.

13. The Phase I report of that Study, which was a broad reconnaissance type study, was issued in October 1971 and utilities were given until July 1, 1972, to

comment on the report. The responses received did not indicate that a plan for the coordinated development could be formulated and the study was terminated at the end of Phase I.

14. The Department of the Interior has taken action to control development of coal on a national basis, including the Northern Great Plains. It has initiated a study of potential water resource projects in southeastern Montana and northeastern Wyoming (*the Montana-Wyoming Aqueducts Study*). It has established a new national coal leasing policy and has halted the issuance of prospecting permits. It has also established a policy with respect to coal leasing of Indian lands and has instituted the Northern Great Plains Resources Program (NGPRP). Those actions, however, are not part of a plan or program to develop or encourage development but are attempts to control development by individual companies in a manner consistent with the policies and procedures of the National Environmental Policy Act of 1969.

15. The new national coal leasing policy was announced by the Secretary of Interior on February 17, 1973. This policy has both short-term and long-term aspects. One aspect of the policy is the preparation of an Environmental Impact Statement on the proposed Federal coal leasing in the United States. This statement is referred to as the coal programmatic EIS. The primary objective of the statement is to provide a national overview of the impact of the entire Federal coal leasing program on the quality of the human environment.

16. That statement will not deal with proposed developments of individual companies. It will serve as the foundation and framework for subsequent environmental analyses and supplemental statements which

may be prepared for subregions, geological structures or basins, or on an individual basis for coal management actions. Also, the coal programmatic EIS is essential to the development of a planning system to determine the size, timing, and location of future coal leases in order to meet energy needs most effectively.

17. A working draft of the statement has been prepared and is currently undergoing internal review. When it is completed, it will be issued in draft form for general agency and public comment. This will allow public involvement in the analysis and review of the Federal leasing policies and procedures which have an impact upon the environment. It is planned that the final coal programmatic EIS will be issued in early 1974 following consideration of comments and necessary review.

18. Prior to the issuance of the coal programmatic EIS in its final form and the development of the planning system, coal leases will not be issued except pursuant to the short-term coal leasing policy which was announced in the news release of February 17, 1973. That policy dictates that coal leases will be issued only under the following conditions:

a. When coal is needed now to maintain existing mining operations; or

b. When coal is needed as a reserve for production in the near future; and

c. When the land to be mined will in all cases be reclaimed in accordance with lease stipulations that will provide for environmental protection and land reclamation; and

d. When an environmental impact statement covering the proposed lease has been prepared when required under the National Environmental Policy Act.

19. The short-term leasing policy will restrain leasing in the Northern Great Plains region except under

the conditions set forth in paragraph 18 and will limit the Department's actions to those for which it has adequate information basis. It is intended to insure that current coal production can continue and to prevent deficiencies in supplies of coal which are necessary to meet continuing energy needs.

20. The information compiled and developed will expand the Department's informational basis upon which decision will be made. The coal programmatic EIS in its present form contains material relative to the Northern Great Plains. The section on the various environments where coal occurs includes an extensive part on the Northern Great Plains region with discussions relating to geology, topography, climate, hydrology, soils, vegetation, wildlife, land use, population patterns, and human value resources in the province. In addition, the section on impacts on the environment from coal leasing contains a part on the impacts unique to the Northern Great Plains region. Other material analyzed and developed in the coal programmatics EIS will be valuable in decision-making relative to the Northern Great Plains, such as discussions relating to measures to mitigate environmental impacts, alternative sources of energy, and conservation of energy use.

21. The issuance of coal prospecting permits by the Department of the Interior was halted by Secretarial Order No. 2952 issued February 13, 1973. No prospecting permits will be issued until further notice. The purpose of that order was to allow for the more orderly development of coal resources upon the public lands with proper regard for the protection of the environment in a manner consistent with the National Environmental Policy Act of 1969.

22. In fulfilling its fiduciary responsibilities, the policy of the Department with respect to approval of coal leasing on Indian lands is that approval will be granted where the tribal or individual Indian landowner desires to dispose of the minerals, where the terms and conditions of the lease are in the best interest of the Indian landowners, where appropriate environmental safeguards are imposed on the lessee and where the requirements of National Environmental Policy Act have been satisfied.

23. The NGPRP study was initiated by the Secretary of Interior in an interdepartmental memorandum of June 30, 1972 and later announced in a press release of October 3, 1972. The study is to provide a tool for planning at all levels of government rather than to develop an actual plan. The study is being conducted by an interagency, Federal-State Task Force with public participation. Its analyses are to be based on assumptions of various possible levels of resource development in order to provide an informational framework for informed decision-making and planning. The study will consist of a series of investigations and studies conducted by work groups in seven principal areas of concern: regional geology; mineral resources; water (supply and quality); air quality; surface resources; social, economic, and cultural aspects; and national energy consideration. The results of these investigations will be integrated into the development of scenarios for predicting the environmental and socia' consequences of various possible developments.

24. The NGPRP is financed and staffed and the study is underway. The work groups are in the field, public meetings have been held in the Northern Great Plains areas. The work groups are to complete their

preliminary reports in the spring of 1974 and an overall interim report is to be prepared by June 1974. After review of the report, decisions will be made concerning the necessity of further study in specific areas.

25. The purpose of the Department of Interior policy with respect to resource development in the Northern Great Plains areas is to insure that development does not proceed based solely on single purpose studies incapable of developing comprehensive information or by piecemeal actions which restrict future options. To fulfill that purpose the granting or approval of leases, special use permits and all types of rights-of-way across public lands, the delivery and sale of water and approval of mining plans relating to coal development in the Northern Great Plains areas will be held in abeyance pending the availability and analysis of the interim report from the NGPRP study or submitted to the Under Secretary of Interior for review and concurrence prior to execution.

26. With respect to the Montana-Wyoming Aqueducts Study, the decision was made in the fall of 1972, not to seek funding for fiscal 1974 and no funding will be sought for fiscal 1975. That study and other proposals such as the Morehead Dam will be held on abeyance pending the results of the NGPRP study.

27. After completion of the coal programmatic EIS in early 1974, decisions will be made concerning supplemental statements necessary for coal management actions. It is possible a decision will be made to prepare a statement for the entire Northern Great Plains region, but the information available may indicate that statements on smaller subregions, geologic structures, basin, or selected individual actions will fulfill the policy and procedural requirements of the National Environmental Policy Act in a more satis-

factory manner. Until those decisions are reached, no new coal leases will be issued except pursuant to the short-term leasing policy. The interim report from the NGPRP will be available in the summer of 1974 and will provide an informational foundation for decision-making and planning. This information will be utilized in decision-making for all coal related actions in the Northern Great Plains areas and will form a useful reference source for preparing environmental analyses and statements on proposed actions or groups of actions in the Northern Great Plains area. Until the interim report is available, decisions relating to coal development in the Northern Great Plains will be held in abeyance or submitted to the Under Secretary for review and concurrence.

28. Neither the Department of Agriculture which has jurisdiction over issuance of permits for rights-of-way over lands within national forests nor the Corps of Engineers which has jurisdiction over navigable rivers has pending before either any applications for any permits or rights-of-way within their authority to grant. Nor does either agency intend to consider such applications prior to June 30, 1974.

29. There is no existing or planned Federal program or action in the area defined by the plaintiffs as the "Northern Great Plains region" to which appropriations of funds have been allocated for implementation of proposals, or for which there is a schedule for the implementation of proposals, or as to which the Federal Government has made commitments to take further steps to carry out proposals.

30. There is no evidence of record in this case that in the area defined by the plaintiffs as the "Northern Great Plains region" that Federal action has been taken or is threatened to be taken on individual proj-

ects for the development of coal or other resources without compliance with the requirements imposed by NEPA and by applicable state laws relating to environmental consideration.

31. There is no evidence of record in this case that individual projects by private industry for the development of coal and other resources in the area defined by the plaintiffs as the "Northern Great Plains region" are being planned or constructed as part of any integrated plan or program for any such area, or that any such individual projects are interrelated or integrated with other like projects in such area.

32. There is no evidence in the record of this case that irreparable harm would result to plaintiffs if an injunction were not granted as prayed or that the balance of equities favors the granting of such an injunction.

33. The record in this case establishes that large sums have been invested in good faith by the intervening defendants and others in connection with and in reliance upon individual existing and proposed projects in the "Northern Great Plains region" referred to in the complaint for the development of coal and other resources and for the use of such coal for the generation of electricity and production of synthetic natural gas; and that if an injunction as requested by the plaintiffs were to issue, irreparable harm would result to the intervening defendants, who have submitted affidavits describing their commitments and potential losses, and to the public at large.

CONCLUSIONS OF LAW

1. The jurisdiction of the Court over the subject matter of this action is founded upon 28 U.S.C. § 1331(a).

2. Rule 56(c) of the Federal Rules of Civil Procedure requires that in order for a summary judgment to be entered in this case on the motion of any party, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits" must "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Committee for Nuclear Responsibility* v. *Seaborg,* 463 F.2d 783, 787–788 (D.C.Cir. 1971); Fed. R. Civ. P. 56(c).

3. Section 102(2) of NEPA, 42 U.S.C. § 4332(2), requires "all agencies of the Federal Government" to

> (A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment;
>
> * * * * *
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enchantment of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.
>
> * * * * *

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources * * *.

4. NEPA Section 102(2)(C) requires an environmental impact statement before "major Federal actions" are taken with respect to an individual Federal project. Multiple applications for Federal action in connection with individual private projects which are unrelated to each other, except that they involve resource development at some point within a multistate area, do not constitute a private or Federal regional plan or program for development, nor do they require the Federal Government to develop a regional plan or program for development with respect to such multiple applications. Questions relating to the scope of an environmental impact statement prepared for each individual application are to be decided initially by the Federal agency or agencies involved at the time action is taken upon such application. *Scientists' Institute for Pub. Info.* v. *AEC,* 481 F.2d 1079, 1091 (D.C. Cir. 1973); *Jicarilla Apache Tribe of Indians* v. *Morton,* 471 F. 2d 1275 (9th Cir. 1973); *Natural Resources Defense Council* v. *Morton,* 458 F. 2d 827, 836 (D.C. Cir. 1972).

5. The requirement in NEPA Section 102(2)(A) that Federal agencies utilize a "systematic, interdisciplinary approach . . . in planning and decision making which may have an impact on man's environment" by its own terms does not require that such an approach be on a region-wide basis where, as in this case, the "planning and decisionmaking" is not on a region-wide basis. Similarly, the requirement in NEPA Section 102(2)(D) that Federal agencies

"study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources" by its own terms does not necessitate that the "appropriate alternatives" to be studied, developed, and described be on a region-wide basis where, as in this case, the "recommended course of action" is not on a region-wide basis. *See Environmental Defense Fund* v. *Hardin,* 325 F. Supp. 1401, 1403 (D.D.C. 1971). Federal approval of individual projects or applications, including preparation of environmental impact statements relating thereto, need not await completion of "regional" studies not oriented to the particular project or application. *Jicarilla Apache Tribe of Indians* v. *Morton,* 471 F.2d 1275, 1280–1281 (9th Cir. 1973).

6. Since there is no existing or proposed regional program or project or other regional "federal action" within the meaning of NEPA Section 102(2) for the development of coal or other resources in the "Northern Great Plains region", the complaint does not set forth a claim upon which relief can be granted.

7. Questions relating to the scope and validity of studies and environmental impact statements in connection with proposed Federal actions under NEPA Sections 102(2)(A), (C) and (D) are to be decided by the Federal agency responsible for the proposed action with respect to an individual project, and the courts will not review the validity of supporting statements or studies until final Federal actions taken under NEPA Section 102(2) and until after final agency action has been taken with respect to the individual project. *Scientists Institute for Pub. Info.* v. *AEC,* 481 F.2d 1079, 1091 (D.C. Cir. 1973); *Natural Resources Defense Council* v. *Morton,* 458 F. 2d 827, 836

(D.C. Cir. 1972); *Coalition for Safe Nuclear Power* v. *AEC*, 463 F. 2d 954, 955 (D.C. Cir. 1972); *Thermal Ecology Must Be Preserved* v. *AEC*, 433 F.2d 524, 526 (D.C. Cir. 1970); *Gage* v. *Commonwealth Edison Co.*, 356 F. Supp. 80, 86 (N.D. Ill. 1972); *Sherry* v. *Algonquin Gas*, 4 ERC 1713, 1714 (D. Mass. 1972).

8. For the reasons set forth in Conclusion of Law No. 7 the complaint does not present a justiciable case or controversy with respect to proposed or future Federal action. *Eccles* v. *Peoples Bank of Lakewood Village*, 333 U.S. 426, 434 (1948); *Ashwander* v. *TVA*, 297 U.S. 288, 324 (1936); *Committee to Stop Route 7* v. *Volpe*, 4 ERC 1681, 1683, 1684 (D. Conn. 1972).

9. The Northern Great Plains Resource Program now being conducted under the auspices of the Department of the Interior is a study project and not a program for development, and it does not constitute "major Federal action" within the meaning of NEPA Section 102(2)(C). There has been no showing in this case that the Northern Great Plains Resources Program "has life" as a federal regional program for development of coal and other resources or is accompanied by either a schedule for implementation of concrete proposals, commitments that steps toward implementation will be taken, or specific annual appropriations for its work. *Scientists' Institute for Pub. Info* v. *AEC*, 481 F. 2d 1079, 1082–1084, 1087, 1095–1098 (D.C. Cir. 1973).

10. Even if there were some regional Federal program for the development of coal and other resources in the "Northern Great Plains region", NEPA would not prohibit Federal action upon an individual project within the "region" on the basis of an environmental impact statement prepared for that project prior to completion of the regional program. *Jicarilla Apache*

Tribe of Indians v. *Morton*, 471 F.2d 1275 (9th Cir. 1973); *Indian Lookout Alliance* v. *Volpe*, 5 ERC 1749, 1754 (8th Cir. 1973); *Environmental Defense Fund, Inc.* v. *Armstrong*, 356 F. Supp. 131 (N.D. Cal. 1973); *Movement Against Destruction* v. *Volpe*, 5 ERC 1625 (D. Md. 1973).

11. Even if the complaint stated a claim upon which relief could be granted, plaintiffs would not be entitled to an injunction against any actions by the Federal Government affecting coal development in the Northern Great Plains region because there has been no showing in this case that irreparable harm would result in the absence of such an injunction or that the balance of equities favors the granting of such an injunction; and because the record discloses that such an injuction would cause irreparable injury to the defendants and to the public at large. *Aberdeen & Rockfish R.R.* v. *SCRAP*, 409 U.S. 1207, 1218 (1972); *Environmental Defense Fund, Inc.* v. *Froehlke*, 477 F. 2d 1033, 1036, 1037 (8th Cir. 1973); *Sierra Club* v. *Hickel*, 433 F. 2d 23, 33 (9th Cir. 1970).

12. On the basis of the foregoing findings of fact and conclusions of law, the motion for summary judgment filed by the Federal defendants and the motions for summary judgment and for judgment on the pleadings filed by the intervening defendants should be granted; and the motion for summary judgment filed by the plaintiffs should be denied.

BARRINGTON D. PARKER,
United States District Judge.

FEBRUARY 14, 1974.

APPENDIX E

United States District Court for the District of Columbia

[C.A. No. 1182–73, Filed November 25, 1974;
James F. Davey, Clerk]

SIERRA CLUB ET AL., PLAINTIFFS

v.

ROGERS C. B. MORTON ET AL., DEFENDANTS

RESPONSE TO REMAND

On October 14, 1974, the United States Court of Appeals for the District of Columbia Circuit remanded this matter to the District Court for a further evidentiary hearing. Specifically, the Court of Appeals requested findings on certain matters embraced in nine questions. Pursuant to the remand a hearing was held and a schedule was developed for submissions by the parties. Affidavits from officials of the Departments of Interior, Agriculture and Army were submitted, with proposed findings. The plaintiffs were allowed to conduct discovery by way of written interrogatories, and by taking the deposition of William W. Lyons, Deputy Undersecretary of the Interior. This deposition was supplemented by Mr. Lyons' in-court testimony. Proposed findings were submitted by the plaintiff.

The Court has considered the responses and objections of both sides and enters its *Supplemental Findings on Remand.*

Entered: November 25, 1974.

BARRINGTON D. PARKER,
United States District Judge.

592-551—75——9

Supplemental Findings Pursuant to Remand

INQUIRY NO. 1

Is the limitation on the issuance by the United States of coal leases announced on February 17, 1973, still in effect? How many leases have been issued for lands in the Northern Great Plains region since February 17, 1973?

Finding

The limitation on the issuance by the United States of coal leases announced on February 17, 1973 (the short-term coal leasing policy announced by Interior Secretary Morton in the news release of February 17, 1973 and set forth in Item 8 of Secretary Morton's affidavit of October 26, 1973) is still in effect. The Interior Department has not, since February 17, 1973, issued any coal lease in the Northern Great Plains region, which was defined in plaintiffs' original complaint as including northeastern Wyoming, eastern Montana, western North Dakota, and western South Dakota.[1] Pursuant to the national limitation on coal leases,[2] however, four leases covering a total of 4,018.-95 acres have been issued since February 17, 1973, in parts of the United States outside of the Northern Great Plains Region:[3]

[1] *See* Sierra Club v. Morton, C.A. 1182–73 (February 14, 1974) at 4 (Findings of Fact, No's 6 and 7).

[2] *Id.* at 6–7 (Finding of Fact, No. 15).

[3] Answers of Defendant, Rogers C. B. Morton, Secretary of the Interior, to Plaintiffs' Revised Supplemental Interrogatories to Federal Defendants, filed November 11, 1974, at 1.

Lease	State	Date	Acreage
ES-9403	Pennsylvania	July 1,1974	29. 661
ES-12284	Alabama	June 1,1974	2388. 24
U-13097	Utah	May 1,1974	1310. 00
C-17130	Colorado	Dec. 1,1973	241. 10

INQUIRY NO. 2

Is the suspension of the issuance by the United States of coal prospecting permits announced February 13, 1973, still in effect? How many, if any coal prospecting permits have been issued in the Northern Great Plains region since February 13, 1973?

Finding

The suspension of the issuance by the United States of coal prospecting permits, announced by Secretarial Order No. 2952 issued February 13, 1973 and attached as Exhibit II to Secretary Morton's affidavit of October 26, 1973, is still in effect. The Interior Department has not, since February 13, 1973, issued any coal prospecting permits in the Northern Great Plains region as defined by plaintiffs in their complaint.

INQUIRY NO. 3

To what extent has coal leasing on Indian lands in the Northern Great Plains region been approved by the Department of the Interior since February 17, 1973?

Finding

The Department of the Interior has not, since February 17, 1973, approved any coal leasing on

Indian lands within the Northern Great Plains region as defined by plaintiffs in their complaint.

INQUIRY NO. 4

Have any applications for permits for rights-of-way over lands within national forests in the Northern Great Plains region been considered or acted upon by the Department of Agriculture since June 30, 1974? Have any applications for permits for rights-of-way over navigable rivers in the Northern Great Plains region been considered or acted upon by the Corps of Engineers since June 30, 1974?

Finding

Since June 30, 1974 the Department of Agriculture has received the following four applications for rights-of-way over lands within national forests within the Northern Great Plains region as defined by plaintiffs in their complaint, all four on the Thunder Basin National Grasslands in Wyoming: by Wycoalgas Co. (water transmission line right-of-way); Rochelle Coal Co. (conveyer belt right-of-way); Atlantic Richfield Co. (plant site and railroad spur right-of-way). No action will be taken on any of these applications pending completion of an Environmental Analysis Report as to each by the Forest Service of the Department of Agriculture to determine whether or not an environmental impact statement pursuant to the National Environmental Policy Act is necessary and the completion of such an impact statement if one is found to be necessary.

The Corps of Engineers has, since June 30, 1974, issued no permits for rights-of-way over navigable rivers within the Northern Great Plains region as defined by plaintiffs in their complaint. The following application in that region is pending: Minnkota Power Coop., transmission line crossing of Missouri River near Price, North Dakota. The Corps has, since June 30, 1974, issued two permits for structures in navigable rivers within that region: Square Butte Electric Co., water intake structure for generating plant cooling, near Bismarck, North Dakota (issued September 23, 1974); and Ottertail Power Co., removal of water intake structure for abandoned power plant near Washburn, North Dakota (issued October 15, 1974). Two applications for permits for structures in this region are pending: Michigan-Wisconsin Pipeline Co., water intake structure for coal gasification plant near Beulah, North Dakota; and Consolidated Development Co., water intake structure out of Oahe Lake for multiple purposes.

INQUIRY NO. 5

Has the Northern Great Plains Resources Program interim report been released? Is any further action contemplated regarding that program?

Finding

A draft interim report of the Northern Great Plains Resource Program was released on September 27, 1974[4] to the participants in that study program for their comments by November 1, 1974; and a revised interim report of the study program is expected to be released to the public by the end of February 1975. The separate reports of the seven work groups of the

[4] This report was identified by William W. Lyons, Deputy Undersecretary of the Interior (Plaintiff's Exhibits 1, 2A, 2B, and 2C) at his deposition on November 4, 1974.

study program will also be released for public inspection at various locations. Thereafter the study program will continue to coordinate federal and state energy related studies, and further studies in specific subject areas wil be conducted by appropriate federal and state entities.

INQUIRY NO. 6

Does the United States Government contemplate the preparation of any future environmental impact statements—other than statements for individual projects—for the Northern Great Plains area, the Fort Union Formation, or for any subregion thereof?

Finding

Decisions by the Department of Interior concerning the scope of future environmental impact statements in the Northern Great Plains region as defined by plaintiffs in their complaint, the Fort Union Formation, or any subregion thereof, will be based upon information developed from such sources as Interior's coal programmatic impact statement and the Northern Great Plains Resources Program and from the nature and proximity of pending and proposed projects. The following statement in Interior Secretary Morton's affidavit of October 26, 1973 remains the most definitive description of that Department's posture with respect to future impact statements:

> It is possible a decision will be made to prepare a statement for the entire Northern Great Plains region, but information available may indicate that statements on smaller subregions, geologic structures, basins or selected individual actions will fulfill the policy and procedural requirements of the National Environmental Policy Act in a more satisfactory manner.

The Department of Agriculture, through its Forest Service, has completed one impact statement (Badlands Planning Unit, Custer National Forest in North Dakota, August 1974) and plans the following six others, on other than individual projects, within the Northern Great Plains region as defined by plaintiffs in their complaint, the Fort Union Formation, or any subregion thereof: Rolling Prairie Planning Unit, Custer National Forest in North Dakota, estimated for July 1975; Cave Hills Planning Unit, Custer National Forest in South Dakota, estimated for December 1975; Ashland Division Land Use Plan, Custer National Forest in Montana, estimated for May 1976; Big Horn Land Use Plan, Big Horn National Forest in Wyoming, estimated for some time in 1977; and Thunder Basin National Grassland Land Use Plan in Wyoming, estimated for some time in 1977. The foregoing impact statements relate or will relate to overall land use planning by the Forest Service in the management and administration of the National Forests and National Grasslands and concern coal and other energy development only as one of many considerations in land management.

INQUIRY NO. 7

What is the status of the granting of water rights and water contracts in the Northern Great Plains area?

Finding

The Forest Service of the Department of Agriculture has no plans to grant water rights or water contracts in the Northern Great Plains area as defined by the plaintiffs in their complaint.

Neither the Bureau of Reclamation of the Department of the Interior nor the Army Corps of Engi-

neers grants water rights. The issuance of a water right permit is solely under the jurisdiction of the individual states.

The Bureau of Reclamation has executed no option contracts for water in the Northern Great Plains Region as defined by plaintiffs in their complaint since July 1971, and denied one such application in September 1973. The Bureau has pending twelve applications (from nine entities) for option contracts to purchase annual quantities of 502,000 acre-feet of water from the Yellowstone Unit of the Pick-Sloan Missouri Basin Program on the Big Horn River and one application for 9,000 acre-feet of water from the Boysen Unit of that Program on the Wind River. Applications are also pending for annual water needs for industrial use totaling 630,000 acre-feet from four entities to divert water from the Wind-Big Horn-Yellowstone River system; from seven entities to divert 360,000 acre-feet of water from Fort Peck Reservoir; from one entity to divert 18,000 acre-feet of water from Lake Tschida (Heart Butte Unit, North Dakota); and from five entities to divert 286,816 acre-feet of water from Lake Sakakawea (Garrison Reservoir, North Dakota). Some of the foregoing units of the Pick-Sloan Missouri Basin Program include joint responsibility with the Army Corps of Engineers. The Departments of the Army and the Interior are currently working to establish common marketing procedures to handle anticipated industrial water sales from main stem reservoirs in the Missouri River Basin. Finalization of one or more of the pending applications may materialize and require Secretarial approval prior to resolution of this case.

The Army Corps of Engineers is currently studying the type of contract and other marketing matters respecting the sale of water for industrial use from

the Missouri River main stem reservoirs and has pending eleven applications by industrial users for purchase of 441,000 acre-feet of water per year. In addition, the Missouri River Division of the Corps is considering entering into water contracts with Lake Andes, South Dakota (municipal use), Sanitary and Improvement District No. 2 of Knox County, Nebraska (municipal and industrial use); Bowman County Water Management District, North Dakota (municipal and industrial use); and City of Gettysburg, South Dakota (municipal and industrial use).

INQUIRY NO. 8

How was the area to be covered by the EIS for the development of coal resources in the Eastern Powder River Coal Basin defined and how was it determined that an EIS was appropriate for that area?

Finding

The appropriateness of the Eastern Powder River Coal Basin Impact Statement[5] and the definition of the area covered were determined as a result of consultations among the Department of Agriculture, the Department of the Interior, and the Interstate Commerce Commission, after a meeting on January 16, 1974 chaired by Deputy-Undersecretary of the Interior, William W. Lyons. The decision to do an impact statement on that area was made after applications for approval of mining plans and necessary rights-of-way were submitted by the Atlantic Richfield Company, the Carter Oil Company, the Kerr-McGee Corporation, and the Wyodak Resources Development Corporation, and an application to the Interstate Commerce Commission for construction of a railroad line

[5] Issued October 18, 1974.

was submitted by the Burlington-Northern, Inc., and the Chicago and Northwestern Transportation Company. The general parameters of the statement area were set out on a map which was distributed at the January 16 meeting. There was no discussion of the factors listed in the preface of the Final Impact Statement (quoted below) at this meeting. The exact boundaries of the areas to be covered were then refined by the field team charged with preparing the final statement.

The preface of the Final Impact Statement, contains a further explanation of how the area was determined:

> The four federal agencies have determined that approval of the pending applications would collectively constitute a major federal action having a significant effect on the quality of human environment. Therefore, the agencies have determined that to protect the public interests most effectively and to meet their individual responsibilities under the National Environmental Policy Act of 1969 most efficiently, they should jointly undertake the preparation of a single environmental impact statement which would consider not only the impacts of the several proposals but also the collective, cumulative impacts, primary and secondary, of the development of the coal resources in the area.
>
> Further, to meet the intent of the Act in the most productive fashion, it is necessary to examine the general geographic area of the proposed and potential actions. The geographic area for basic consideration is that part of the Powder River Coal Basin in Wyoming lying generally eastward from the Powder River to the outcrop line of the coal resource and from somewhat north of Gillette to a point somewhat south of Douglas. The area delineation is based

> in part on present and anticipated levels of mining activity, differing quality of the coal resource, different physical arrangement of the coal beds, somewhat different mining techniques required and differing physical reclamation requirements. These considerations having a broader scope of geographic impact such as social conditions, economic factors, atmospheric influence, water resources, and recreation uses are treated on a larger regional basis than the primary study area. This statement discusses the existing environment, evaluates the collective impact of the proposed actions and, insofar as now possible, the impacts of potential future coal mining within the geographic area described above. This statement also examines in detail certain proposed activities for which federal actions are required.

INQUIRY NO. 9

Regarding environmental impact statements for individual projects in the Northern Great Plains area, where the statements have been issued after February 17, 1973, or prepared for projects that were commenced after that time—

a. Provide one or more representative statements.

b. Do the statements attempt to provide an assessment of the cumulative impact of the governmental action in the surrounding area?

c. Do the statements take into account the ecological setting created by private action in the area?

d. Has the government devised any procedure for cross-referencing among the individual statements?

Finding

9a The Forest Service of the Department of Agriculture has not issued, after February 17, 1973, any

impact statements on individual projects relating to coal development in the Northern Great Plains area as defined by plaintiffs in their complaint.

The Department of Interior has issued the following three impact statements on projects within the Northern Great Plains as defined by plaintiffs in their complaint, and a copy of each is attached to these findings: "Crow Ceded Area Coal Lease, Westmoreland Resources Mining Proposals," attached hereto as Exhibit A; "Proposed Plan of Mining and Reclamation, Big Sky Mine, Peabody Coal Company Coal Lease M-15965, Colstrip, Montana," attached hereto as Exhibit B; "Development of Coal Resources in the Eastern Powder River Coal Basin of Wyoming," attached hereto as Exhibit C.

9b The impact statements contain comprehensive descriptions of the cumulative impact of the governmental action on the surrounding area and this is established by the statements themselves. See for example, Chapter II of the Westmoreland EIS which contains over 100 pages discussing the environmental setting, and physical environment, and also Chapter III which discusses environmental impacts on the human environment, the physical impact, and impact on the market area.

The Peabody Environmental Impact Statement, contains a comprehensive description of the environmental impact of the proposal (pages 115–189) and, assesses the cumulative impact of the governmental action on the surrounding area.

The Eastern Powder River Coal Basin Environmental Impact Statement contains a comprehensive analysis of the environmental impact of the future federal action and considers past and possible future federal actions in the area relating to uranium (I–4

191–194), oil and gas development (I–186–190), and coal gasification proposals (I–40–41, 57, 94–102). Chapter V of this Statement "Probable Cumulative Regional Impacts," sets forth a regional analysis of the potential impact of coal development on such factors as socio-economic conditions, land tenure, transportation, recreation, and agriculture.

9c The impact statements consider the ecological setting created by private activity in a general way with regard to demography and economic and social conditions within the areas covered by the statement.[6] The government's knowledge of private industry's expectation regarding coal development is largely based on applications for mining plans or competitive coal leases submitted by private industry.[7]

9d The government has not devised any regular formalized procedure for cross-referencing among impact statements on individual projects. Cross referencing in future statements will be utilized however, where necessary to describe the existing environment which could be impacted by proposed actions.

The three representative impact statements attached to these findings do cross-reference to a limited degree. The Eastern Powder River Coal Basin impact statement contains parts relating to each of five different proposals and a separate part consisting of a regional analysis of the cumulative environmental impact on the entire Eastern Powder River Coal Basin. There are thus cross references among individual *proposals* within the Eastern Powder statement. The Westmoreland Impact Statement contains a number of references to impact statements on other projects,

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[6] *See* Westmoreland EIS at 93–99; Peabody EIS at 139–149; Eastern Powder EIS at I–392–458.

[7] *See* Lyons deposition at 118.

marked by number in the text and appearing at the end of the Statement in a Table of References.[8] The Peabody Statement refers to other impact statements in a Table of References but does not correlate these to the text.[9]

NOVEMBER 25, 1974.

BARRINGTON D. PARKER,
United States District Judge.

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[8] *See* Westmoreland EIS at 201 ff.
[9] *See* Peabody EIS at 430 ff.

APPENDIX F

United States Court of Appeals for the District of Columbia Circuit

September Term 1974, Civil 1182–73, Filed, June 16, 1975; Hugh E. Kline, Clerk

No. 74–1389

SIERRA CLUB, ET AL., APPELLANTS

v.

ROGERS C. B. MORTON, SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.

Appeal from the United States District Court for the District of Columbia.

Before: BAZELON, Chief Judge, WRIGHT and MACKINNON, Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby reversed and this case is hereby remanded to the District Court, in ac-

cordance with the opinion of this Court filed herein this date.

Per Curiam.

For the Court.

HUGH E. KLINE,
Clerk.

Date: JUNE 16, 1975.

Opinion for the Court filed by Circuit Judge Wright.

Dissenting opinion filed by Circuit Judge MacKinnon.

U.S. GOVERNMENT PRINTING OFFICE: 1975